1984 ANNUAL REPORT

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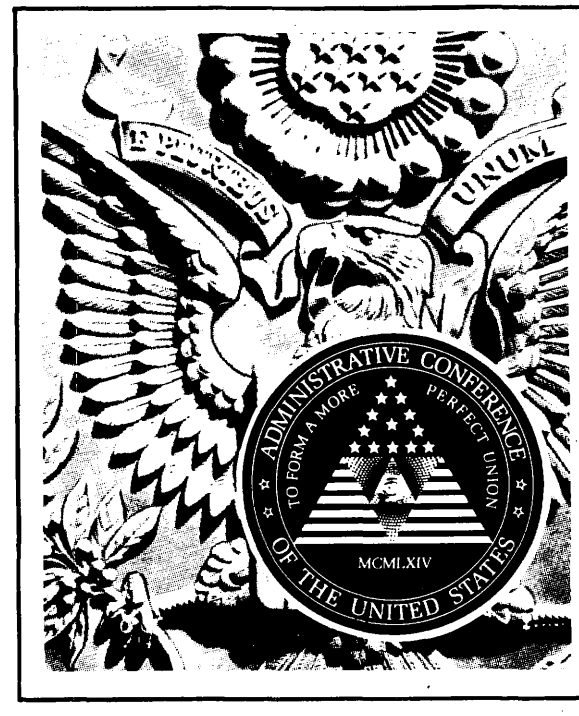
Administrative Conference of the United States



LETTER OF TRANSMITTAL

Administrative Conference of the United States
Office of the Chairman
Washington, D.C.

May 1985

To the President and the Congress of the United States:

I have the honor to transmit herewith the 1984 Report of the Administrative Conference of the United States.

This report describes the significant activities of the Administrative Conference for the twelve month period from January 1, 1984, through December 31, 1984.

Respectfully,

Loren A. Smith

Chairman

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LOREN A. SMITH, *Chairman*
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

CHAIRMAN'S FOREWORD

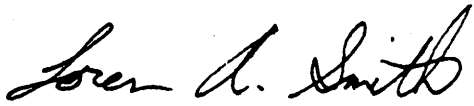
This is my fourth annual report on the activities of the Administrative Conference of the United States. As we enter the second half of President Reagan's administration it is timely to reflect upon the condition of administrative law. That condition, I believe, reveals a serious political and constitutional problem, one going to the very foundation of a free society. The problem is manifested in an erratic and ad hoc approach to administrative reform by the body politic. New tasks are continually put forward for the administrative state at the same time that new restrictions are imposed upon that same state's ability to perform its existing tasks.

From our statutory scheme it is clear that we trust government less the less, and yet we see only a small slowing in the rate of growth of demands for new governmental functions. Many see government regulation as the answer to most of our social ills, while finding the political office holders and administrators, who inevitably are needed to turn any program into concrete reality, untrustworthy of such power. The solution has become to resort to a more and more judicialized, and hence rigid, administrative system. This system increasingly converts the social policy preferences of some, into permanently fixed "rights". It is a system that is less and less political, and hence anti-democratic.

I am afraid that administrative law—that body of law which has as its mission the organization and control of the administrative state—has lost its theoretical foundation. There is now no clear and concise vision of what a government agency is or should be, how it must be structured, what its limitations are, what the ultimate role of expertise and coherence is or should be, what is really meant by discretion, and whether the administrative process is really better than conceivable alternatives.

If the overproceduralization and excessive judicial activism—that I call judicialization—is not to be the twilight of administrative law as a meaningful discipline, then we must rethink the role of government in our society. We must come up with a coherent and moral justification for the exercise of this power along with strong and principled limitations upon the use of such power. These limitations must be substantive as well as procedural, and they must be independent of whether we "like" the political administration or a particular agency's mission. Without this kind of restructuring of administrative law theory we will see increasingly more rigid judicialization and a further breakdown in the relationship between sensible governmental structures and the ones we actually have at the federal level.

The exciting challenge the Conference faces is to continue as the guardian of true and real administrative law principles, while becoming a source for broader positive change within the federal governmental system. We must, and I believe we can, become legal architects as well as legal craftsmen. The uniqueness of the Conference lies in its enormous body of knowledge about good administrative procedure. Its future relevance will be created by relating these principles to a coherent and effective constitutional system and to the role of the administrative process within that system.



LOREN A. SMITH
Chairman

MEMBERS OF THE ADMINISTRATIVE CONFERENCE

THE COUNCIL

Chairman	LOREN A. SMITH
Vice Chairman	MARK S. FOWLER
	LINDA CHAVEZ
	T. KENNETH CRIBB, JR.
	MICHAEL R. GARDNER
	WALTER GELLHORN
	EDITH D. HAKOLA
	JAMES C. MILLER III
	DANIEL OLIVER
	EDWARD C. SCHMULTS*
	OTIS M. SMITH
	EDWARD L. WEIDENFELD

*Term of service ended in 1984.

GOVERNMENT MEMBERS

Agriculture	JOHN GOLDEN
CAB	BARBARA E. MCCONNELL
CFTC	KENNETH M. RAISLER
Commerce	IRVING P. MARGULIES
CPSC	SAUNDRA BROWN ARMSTRONG
	TERRANCE M. SCANLON*
Defense	ROBERT A. GILLIAT
Education	HUNTER C. HARRISON, JR.
EEOC	WILLIAM A. WEBB
Energy	THEODORE J. GARRISH
	JAMES R. RICHARDS
EPA	A. JAMES BARNES
	JEAN F. GREENE
FCC	BRUCE E. FEIN*
	JACK D. SMITH
FDIC	ROGER A. HOOD
FEC	FRANK P. REICHE
FERC	MICHEL LEVANT
	WILLIAM H. SATTERFIELD
FHLBB	NANCY L. FELDMAN
FMC	C. JONATHAN BENNER*
	ROBERT D. BOURGOIN
FRS	MICHAEL BRADFIELD
FTC	JOHN H. CARLEY
GSA	ALLIE B. LATIMER
HHS	DARREL J. GRINSTEAD
	JUAN A. DEL REAL*
HUD	JOHN J. KNAPP
ICC	REESE H. TAYLOR, JR.
Interior	MARIAN BLANK HORN
Justice	WILLIAM BRADFORD REYNOLDS
	JONATHAN C. ROSE*
Labor	SETH C. ZINMAN
NASA	S. NEIL HOSENBALL
NLRB	
NRC	JAMES K. ASSELSTINE
OMB	MICHAEL J. HOROWITZ
OPM	DANIEL R. LEVINSON
	JOSEPH A. MORRIS*
OSHRC	MICHAEL E. BAUMANN
	E. ROSS BUCKLEY*
SBA	MARVIN H. MORSE*
	FRANK S. SWAIN
SEC	BEVIS LONGSTRETH*
	AULANA PETERS
State	K. E. MALMBORG
Transportation	NEIL R. EISNER
	J. E. MURDOCK III
Treasury	JEROME D. SEBASTIAN
	MARGERY H. WAXMAN
USCCR	LAWRENCE B. GLICK
USPS	LOUIS A. COX
VA	FREDERIC L. CONWAY

*Term of service ended during 1984.

ERRATA SHEET

Administrative Conference of the United States

1984 Annual Report

Due to the printer's error, caption lines for top left and top right photographs were inadvertently omitted from page 19. They should read Herbert E. Ellingwood (top left) and Judge Stephen Breyer (top right).

PLEASE INSERT THIS PAGE BETWEEN PAGES 18 AND 19.

PUBLIC MEMBERS

CORNWELL G. APPLEBY*
DAVID M. BARRETT*
ROGER V. BARTH
LEAANNE BERNSTEIN
MICHAEL F. BUTLER
WILLIAM A. BUTLER
BETTY JO CHRISTIAN
CALVIN J. COLLIER
H. CLAYTON COOK, JR.
ROBERT J. D'AGOSTINO
DAVID DAVENPORT
RICHARD W. DUESENBERG
THOMAS F. ELLIS*
GARY M. EPSTEIN
DANIEL F. EVANS, JR.
RALPH C. FERRARA*
ROBERT E. FREER, JR.
E. GORDON GEE*
MARION EDWYN HARRISON
WILLIAM F. HARVEY
DOUGLAS B. HURON
PAUL D. KAMENAR
RICHARD J. LEIGHTON
HENRY G. MANNE*
JANE A. MATHESON**
JAMES MCCLELLAN
CLARENCE V. MCKEE
ALAN B. MORRISON
JAMES S. MUNN
SALLYANNE PAYTON
WILLIAM T. QUILLEN
BRUCE RABB
RONALD E. ROBERTSON
JOSEPH H. RODRIGUEZ*
VICTOR G. ROSENBLUM
JANE R. ROTH*
T. TIMOTHY RYAN, JR.
PHILIP D. SAXON
PHYLLIS SCHLAFLY
PETER L. STRAUSS
THOMAS M. SUSMAN
EDGAR H. TWINE*
PAUL R. VERKUIL*
MICHAEL B. WALLACE
HARRIS WEINSTEIN
STEPHEN A. WEITZMAN
RICHARD E. WILEY***
LANCE H. WILSON

*Term of service ended in 1984.
**Appointed Special Counsel during 1984.
***Appointed Senior Fellow during 1984.

LIAISON REPRESENTATIVES

ABA-Administrative Law Section	WILLIS B. SNELL
ABA-Coordinating Group on Reg. Reform	RICHARD B. SMITH
ABA-National Conference of ALJs	NAHUM LITT
	DELPHENE C. STRICKLAND*
ACIR	DAVID E. NETHING
ACTION	J.C. ARGETSINGER
Administrative Office of the U.S. Courts	JOSEPH F. SPANIOL, JR.
AID	RICHARD A. DERHAM*
	HOWARD M. FRY
Board of Immigration Appeals	WILLIAM R. ROBIE
CIA	STANLEY SPORKIN
Executive Office of the President	STEPHEN H. GALEBACH
	MICHAEL UHLMANN*
Federal ALJ Conference	EDWIN S. BERNSTEIN*
	JAMES J. O'MEARA, JR.
Federal Judicial Center	CHARLES W. NIHAN
	ALICE L. O'DONNELL**
Federal Register	JOHN E. BYRNE
FMSHRC	ROSEMARY M. COLLYER*
GAO	ROLLEE H. EFROS
	MILTON J. SOCOLAR*
Government Printing Office	MARK C. CRAMER
International Trade Commission	MICHAEL H. STEIN*
Judicial Conference of the U.S.	STEPHEN BREYER
	CARL MCGOWAN
Legal Services Corporation	DONALD P. BOGARD
Merit Systems Protection Board	HERBERT E. ELLINGWOOD
Patent and Trademark Office	GERALD J. MOSSINGHOFF
Pension Benefit Guarantee Corp.	HENRY ROSE*
	CHARLES C. THARP
Postal Rate Commission	JANET D. STEIGER
Selective Service System	HENRY N. WILLIAMS
U.S. Claims Court	ALEX KOZINSKI
U.S. Court of Appeals Federal Circuit	HOWARD T. MARKEY
U.S. Court of International Trade	EDWARD D. RE
U.S. Court of Military Appeals	ROBINSON O. EVERETT

*Term of service ended in 1984.

**Appointed Special Counsel during 1984.

SENIOR FELLOWS

WILLIAM H. ALLEN
ROBERT A. ANTHONY
CLARK BYSE
ROGER C. CRAMTON*
KENNETH CULP DAVIS
WARNER GARDNER
CORNELIUS B. KENNEDY
PHILIP A. LOOMIS JR.*
MALCOLM S. MASON
ANTHONY L. MONDELLO
OWEN OLPIN
MAX D. PAGLIN
REUBEN B. ROBERTSON III
HAROLD L. RUSSELL
ANTONIN SCALIA
JAMES E. WESNER
RICHARD E. WILEY**
JERRE S. WILLIAMS
FRANK M. WOZENCRAFT

SPECIAL COUNSELS

FRED F. FIELDING
C. BOYDEN GRAY
JANE A. MATHESON***
ALICE L. O'DONNELL****

*Term of service ended in 1984.
**Also served as Public Member during 1984.
***Also served as Government Member during 1984.
****Also served as Liaison Representative during 1984.

CONSULTANTS TO THE ADMINISTRATIVE CONFERENCE

ARVIL V. ADAMS	*MSPB alternative dispute resolution*
FREDERICK R. ANDERSON, JR.	*Negotiated cleanups under Superfund**
ROBERT A. ANTHONY	*Confidential information in ITC cases**
LARRY A. BAKKEN	*Non-ALJ hearing officers*
GEORGE A. BERMANN	*Settlement of tort claims**
BARRY B. BOYER	*Environmental citizen suits*
GEORGE D. BROWN	*Block grants**
RONALD A. CASS	*Governmental torts*
COLIN S. DIVER	*Federal/state enforcement*
JOSE FIGUEROA-RIVERA	*MSPB alternative dispute resolution*
PHILIP J. HARTER	*Alternative dispute resolution; Alternatives to regulation**
GEORGE R. JOHNSON, JR.	*Split enforcement model*
JACK M. KRESS	*Regulatory inspections**
JACQUELINE C. LEIFER	*Debt Collection Act of 1982*
L. HAROLD LEVINSON	*State administrative law*
THOMAS O. MCGARITY	*Regulatory analysis*
THOMAS D. MORGAN	*Regulatory budget*
ALFRED S. NEELY IV	*Statutory preclusion of cost/benefit analysis*
GREGORY L. OGDEN	*Siting of industrial facilities**
CHRISTOPHER OSAKWE	*Judicial review of agency action**
RICHARD J. PIERCE, JR.	*Preemption**
BURNELE V. POWELL	*Declaratory orders*
JOHN H. REESE	*British Council on Tribunals*
MALCOLM C. RICH	*State ALJ corps*
JONATHAN ROSE	*Non-lawyer representation**
VICTOR G. ROSENBLUM	*ALJ performance evaluation*
TERESA M. SCHWARTZ	*Product recalls**
HAROLD I. SHARLIN	*ACUS Regulatory Colloquium*
ROBERT E. STEIN	*Permit process**
PAUL R. VERKUIL	*Immigration adjudication*
DAVID M. WELBORN	*Government in the Sunshine Act**
SCOTT C. WHITNEY	*EPA permit procedures*
LUIZE E. ZUBROW	*Debt Collection Act of 1982*

*Project concluded during 1984.

Staff Members at the Twenty-ninth Plenary Session.

◀ RICHARD K. BERG, GENERAL COUNSEL
STEPHEN L. BABCOCK,
EXECUTIVE DIRECTOR

MICHAEL W. BOWERS, ▶
SENIOR STAFF ATTORNEY

STAFF OF THE OFFICE OF THE CHAIRMAN

CHAIRMAN	LOREN A. SMITH
Special Assistant to the Chairman	CAROLE D. IANNELLI
Confidential Assistant to the Chairman	JUDITH M. HYDES
Executive Director	STEPHEN L. BABCOCK
General Counsel	RICHARD K. BERG
Research Director	JEFFREY S. LUBBERS
Senior Staff Attorney	MICHAEL W. BOWERS
Staff Attorney	WILLIAM C. BUSH
Staff Attorney	MARY CANDACE FOWLER
Staff Attorney	CHARLES POU JR.
Staff Attorney	DAVID M. PRITZKER
Administrative Officer	NORMA B. SMITH
Librarian and Information Officer	SUE J. BOLEY
Secretarial Staff	SHARON D. ANDERSON
	EUNICE M. BUTLER
	BARBARA A. HARMON*
	SUSAN M. MACK
	BETTY M. PALMER
	THERESA C. YOUNG
Visiting Scholar	JACK M. KRESS

*Resigned during 1984.

Between projects at the Twenty-ninth Plenary Session.

CLARK BYSE, MARION EDWYN HARRISON, VICTOR G. ROSENBLUM

MAX D. PAGLIN, KENNETH CULP DAVIS

ORGANIZATION AND OPERATION

The Administrative Conference of the United States was established as a permanent independent federal agency by the Administrative Conference Act of 1964 (5 U.S. Code 571-576) and was activated by the appointment of its first Chairman in January 1968. The Conference identifies causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights, and recommends improvements to the President, the agencies, the Congress, and the courts. The statute and bylaws governing the organization and operation of the Conference are set forth at the end of this report.

The Conference is a membership organization consisting of three related parts—the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

The Chairman of the Administrative Conference is appointed by the President, with the advice and consent of the Senate, for a term of five years. The Chairman is the chief executive of the Conference and the only compensated member.

The Chairman, with the approval of the Council, appoints the public members of the Conference. The Chairman presides at plenary sessions of the Assembly and at Council meetings, and is the official spokesman for the Conference in relations with the President, the Congress, the judiciary, the agencies, and the public. The Chiarman has authority to investigate matters brought to his attention by individuals inside and outside government, and to designate subjects for Conference recommendations. The Chairman is served by a small permanent staff that furnishes administrative and research support to the Assembly and committees of the Conference, coordinates and assists the work of consultants, and helps the Chairman in securing implementation of recommendations and in providing advice and assistance to the agencies and to committees of the Congress.

Loren A. Smith, the sixth Chairman of the Administrative Conference, was appointed by President Ronald Reagan on June 30, 1981.

THE COUNCIL

The Council consists of the Chairman and ten other members who are appointed by the President for three-year terms, of whom not more than

one-half may be employees of federal agencies. The Council's functions are similar to those of a corporate board of directors. The Council calls plenary sessions of the Conference and fixes their agendas, recommends subjects for study, receives and considers reports and recommendations before these are considered by the Assembly, and exercises general budgetary and policy supervision.

In 1984 President Reagan appointed Linda Chavez, Staff Director of the U.S. Commission on Civil Rights, to a position on the Council that became available when Edward C. Schmults resigned his position as Deputy Attorney General and left the Council.

CHAIRMAN LOREN A. SMITH ADMINISTERS THE OATH OF OFFICE TO NEW COUNCIL MEMBER LINDA CHAVEZ. VICE CHAIRMAN MARK S. FOWLER ASSISTS IN THE CEREMONY.

Council Members at the Twenty-ninth Plenary Session.

◀ WALTER GELLHORN
JAMES C. MILLER III

◀ T. KENNETH CRIBB, JR.
EDWARD L. WEIDENFELD

JAMES C. MILLER III ▶

T. KENNETH CRIBB JR., EDWARD L. WEIDENFELD, MARK S. FOWLER, EDITH D. HAKOLA

THE ASSEMBLY

Structure of the Assembly

The members of the Conference, when meeting in plenary session, constitute the Assembly of the Conference. The number of members, by statute, may not be fewer than 75 nor more than 91. The Conference, at the end of 1984, had 90 members. The Chairman and the other members of the Council account for 11 of this number. The remaining 79 members fall into three groups: (i) designated by statute, (ii) designated by the President, and (iii) appointed by the Chairman. In addition, several individuals serve in a non-voting status as liaison representative or as senior fellow.

THE ASSEMBLY CONTEMPLATES A PRESENTATION AT THE TWENTY-NINTH PLENARY SESSION.

Statutory Members

The Administrative Conference Act confers membership upon the chairman of each independent regulatory board or commission or a person designated by the agency (5 U.S. Code 573(b)(2)). Fourteen boards and commissions have statutory members. One of these agencies has been allotted a second member by the Council (5 U.S. Code 573(b)(4)) for the purpose of permitting the designation of an administrative law judge.

Board or Commission	Members
Board of Governors of the Federal Reserve System	1
Civil Aeronautics Board	1
Commodity Futures Trading Commission	1
Consumer Product Safety Commission	1
Federal Communications Commission	1
Federal Election Commission	1
Federal Energy Regulatory Commission (includes administrative law judge)	2
Federal Home Loan Bank Board	1
Federal Maritime Commission	1
Federal Trade Commission	1
Interstate Commerce Commission	1
National Labor Relations Board*	1
Nuclear Regulatory Commission	1
Securities and Exchange Commission	1

*Position vacant at the end of 1984.

Agencies Designated by the President

The Administrative Conference Act grants membership to the head (or the designee of the head) of each executive department or other administrative agency designated for this purpose by the President (5 U.S. Code 573(b)(3)). Under this authority, the President has designated 13 Cabinet departments for membership, and the Council has acted to provide some of them additional members. The President has designated 12 other administrative agencies for membership, and the Council has authorized appointment of an administrative law judge from one of the agencies.

Cabinet Department	Members
Agriculture	1
Commerce	1
Defense	1
Education	1
Energy (includes Inspector General)	2
Health and Human Services	1
Housing and Urban Development	1
Interior	1
Justice	1
Labor	1
State	1
Transportation (includes FAA)	2
Treasury (includes IRS)	2

Agency	Members
Environmental Protection Agency (includes administrative law judge)	2
Equal Employment Opportunity Commission	1
Federal Deposit Insurance Corporation	1
General Services Administration	1
National Aeronautics and Space Administration	1
Occupational Safety & Health Review Commission	1
Office of Management and Budget	1
Office of Personnel Management	1
Small Business Administration	1
U.S. Commission on Civil Rights	1
U.S. Postal Service	1
Veterans Administration	1

Public Members

This group consists of members appointed for 2-year terms by the Chairman with the approval of the Council. These "non-government" members, who are required by the Administrative Conference Act to comprise not less than one-third nor more than two-fifths of the total membership, are selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed with respect to federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation.

At the close of 1984 the public members numbered 36. The terms of all incumbent public members will expire on June 30, 1986. Public members are limited to no more than four terms of continuous service (1 CFR 302.2(b)).

Senior Fellows

Under section 2(e) of the bylaws (1 CFR 302.2(e)), former chairmen of the Conference and individuals who have served for eight or more years as members are eligible for 2-year appointments as senior fellows. Senior fellows are assigned to committees and participate in other Conference functions as members, but have no vote. Chairman Smith appointed Malcolm S. Mason and Richard E. Wiley, attorneys in Washington, D.C., to senior fellow status during 1984. Philip A. Loomis, Jr. and Roger C. Cramton resigned their appointments during 1984, leaving the total number of senior fellows unchanged at 17.

CLARK BYSE

ANTONIN SCALIA

Senior Fellows at the Twenty-eighth Plenary Session.

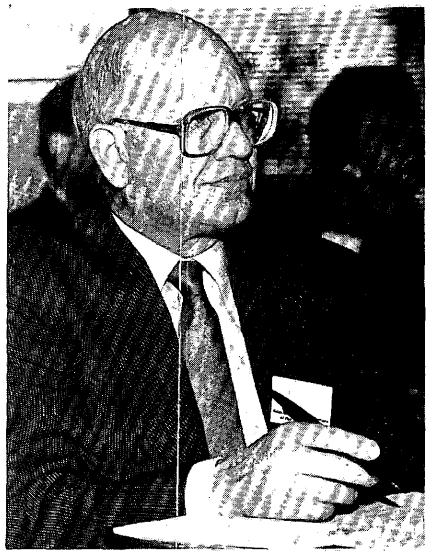
Liaison Arrangements

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, federal agencies not otherwise represented in the Conference, and professional associations (1 CFR 302.4). Individuals who serve in such a capacity participate in the activities of the Conference, having privileges of the floor at committee meetings and plenary sessions, but have no vote. Seven additions during 1984 brought the number of liaison arrangements to 29.

Liaison Organization	Representatives
Judiciary	
Administrative Office of the U.S. Courts	1
Federal Judicial Center	1
Judicial Conference of the United States	2
U.S. Claims Court	1
U.S. Court of Appeals for the Federal Circuit	1
U.S. Court of International Trade**	1
U.S. Court of Military Appeals**	1
Federal Agencies	
ACTION	1
Advisory Commission on Intergovernmental Relations	1
Agency for International Development**	1
Board of Immigration Appeals**	1
Central Intelligence Agency	1
General Accounting Office	1
Government Printing Office**	1
Executive Office of the President	1
Federal Mine Safety and Health Review Commission*	1
Legal Services Corporation	1
Merit Systems Protection Board	1
Office of the Federal Register	1
Patent and Trademark Office**	1
Pension Benefit Guaranty Corporation	1
Postal Rate Commission	1
Selective Service System	1
U.S. International Trade Commission*	1
Professional Associations	
American Bar Association***	3
Federal Administrative Law Judges Conference	1

*Position vacant at the end of 1984.
**Added during 1984.
***Number of representatives increased from 2 to 3 during 1984.

Liaison Representatives at the Twenty-eighth Plenary Session.



JANET D. STEIGER

DAVID E. NETHING

COUNCIL MEMBER WALTER GELLHORN ADDRESSES THE ASSEMBLY AT THE TWENTY-NINTH PLENARY SESSION. SECOND TIER (LEFT TO RIGHT): BARBARA E. MCCONNELL, PROFESSOR JAMES E. BRYNE, ROBERT A. ANTHONY, H. CLAYTON COOK, JR., AND LAWRENCE B. GLICK.

CHAIRMAN LOREN A. SMITH EXPLAINS THE RULES OF ORDER TO GUEST SPEAKER SENATOR ALAN K. SIMPSON.

Operation of the Assembly

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. Acting through the adoption of bylaws, the Assembly has established standing committees to work on individual Conference projects. The committees are the most important component of the process that leads to the adoption of Conference recommendations. At the committee level consultants' reports are first analyzed, and proposed recommendations are formulated.

Committee	Chairman
Adjudication	RICHARD J. LEIGHTON*
Administration	S. NEIL HOSENBALL
Governmental Processes	MARGERY H. WAXMAN
Judicial Review	H. CLAYTON COOK, JR.
Regulation	BETTY JO CHRISTIAN
Rulemaking	CALVIN S. COLLIER

Committees meet periodically to plan and guide research by academic and professional consultants and by the Chairman's professional staff. On the basis of this research, along with public and agency input through written comments and public hearings where appropriate, the committees frame proposed recommendations for consideration by the Assembly. When a study and tentative recommendation have been prepared, these are circulated to the affected agencies and often announced to the public for comment, then reexamined by the committee in light of the replies.

After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for consideration in plenary session. The Assembly may either adopt the recommendation in the form proposed by the committee, amend the recommendation, refer it back to committee, or reject it entirely.

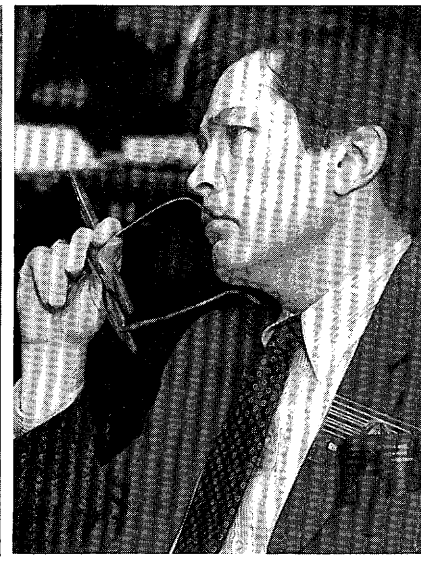
Since January 1968 the Assembly of the Conference has adopted 106 recommendations, many with multiple parts. Seven recommendations were adopted during 1984, and those are reproduced in full in this report under the heading "Actions of the Assembly".

The official actions of the Conference, along with any related research reports, are published in the annual series *Administrative Conference of the United States: Recommendations and Reports*. Recommendations and statements (but not reports) are also published in the *Federal Register*, and those of continuing interest in title 1, parts 305 and 310, of the *Code of Federal Regulations*.

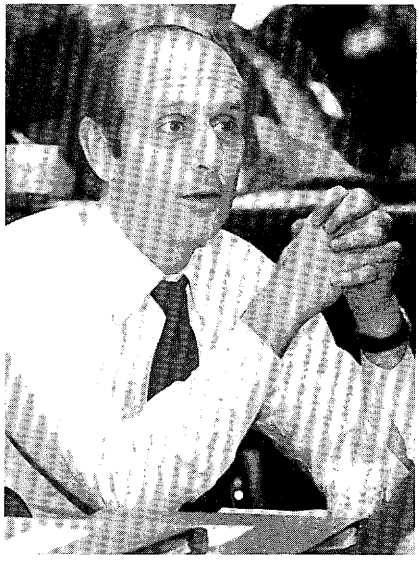
*Jane A. Matheson also served as chairman during 1984.

Participants at the Twenty-ninth Plenary Session.

REUBEN B. ROBERTSON III



RICHARD J. LEIGHTON



STEPHEN BREYER

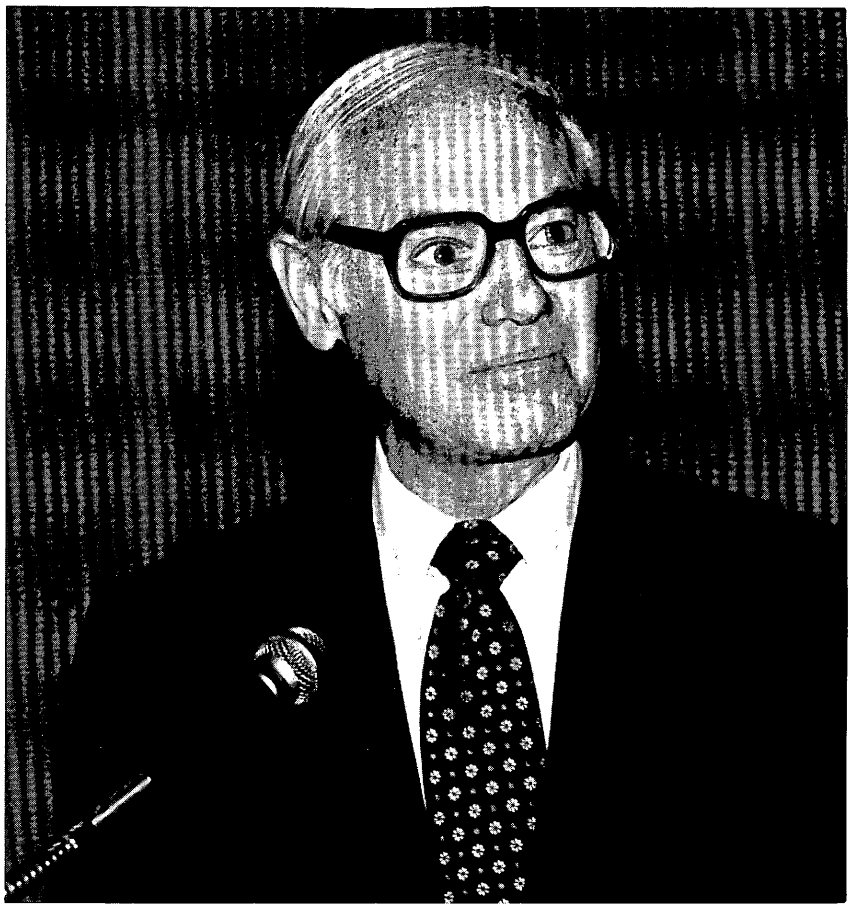
MICHEL LEVANT

HAROLD L. RUSSELL

RONALD E. ROBERTSON

JOSPEH F. SPANIOL, JR.

LOUIS A. COX



ATTORNEY GENERAL WILLIAM FRENCH SMITH DELIVERS THE OPENING ADDRESS AT THE TWENTY-EIGHTH PLENARY SESSION.

ACTIONS OF THE ASSEMBLY

The Twenty-eighth and Twenty-ninth Plenary Sessions of the Administrative Conference were held in Washington, D.C., on June 28 and 29 and December 6 and 7, 1984, respectively. The Conference adopted seven recommendations and discussed the future of administrative law.

TWENTY-EIGHTH PLENARY SESSION

Opening Address

Attorney General William French Smith spoke to the Assembly on progress made in regulatory reform during President Reagan's Administration. Highlights mentioned were the formation of the Vice President's Task Force on Regulatory Relief, the issuance of Executive Order 12,291 establishing OMB review of major agency regulations, and the President's discontinuance of the program for control of petroleum prices and allocation. Attorney General Smith praised a recent Supreme Court decision in *Chevron v. Natural Resources Defense Council*, stating that the Court's opinion "reaffirms the ability of the executive branch to execute laws of Congress without undue interference from the federal judiciary."

Recommendations Adopted

Recommendation 84-1: Public Regulation of Siting of Industrial Development Projects proposes several procedures to be used in the selection of sites for industrial development projects. Long delays in government approval of site selection have plagued industrial expansion for several years, particularly where projects require environmental review and approvals at several levels of government. The Conference suggests methods for interagency coordination as well as for streamlined environmental review. Procedures to expedite the permit application process and to facilitate public participation are spelled out. The Conference also recommends the use of negotiated decision schedules, and makes suggestions with respect to the fixing of time limits for project approval. Recommendation 84-1 is addressed to all levels of government—federal, state, regional, or local—that may be involved in siting industrial projects.

Council Members at the Twenty-eighth Plenary Session.

◀ EDITH D. HAKOLA

OTIS M. SMITH ▶

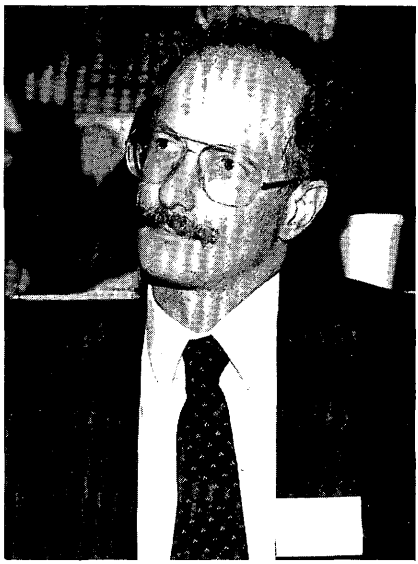
◀ MARK S. FOWLER

Recommendation 84-2: Procedures for Product Recalls suggests several measures designed to streamline the process of obtaining recalls where recall is an appropriate remedy. The recommendation first urges better interagency coordination and sharing of information relevant to recall programs, as well as improved handling of consumer inquiries and complaints and improved means for informing consumers of recalls.

Agencies are also urged to consider asking Congress for additional enforcement tools, to be available in connection with recall programs, that would assist agencies in negotiating voluntary recalls and in carrying out the aims of existing recall programs. The Conference recommends consideration of increased authority for obtaining information about defects from manufacturers, for detaining defective products administratively prior to seeking court-ordered seizures, and for direct access to judicial relief without the necessity of administrative hearings in cases of especially hazardous products. The Conference also recommends legislation to reduce delay in recall actions by the Consumer Product Safety Commission. Proposed amendments to the Consumer Product Safety Act would apply that Act's recall procedures to all products now under the Commission's jurisdiction, and would provide for judicial review of agency ordered recalls in the United States Court of Appeals. In addition, the Conference suggests that the Food and Drug Administration consider asking for civil money penalty authority where only criminal penalties are now available.

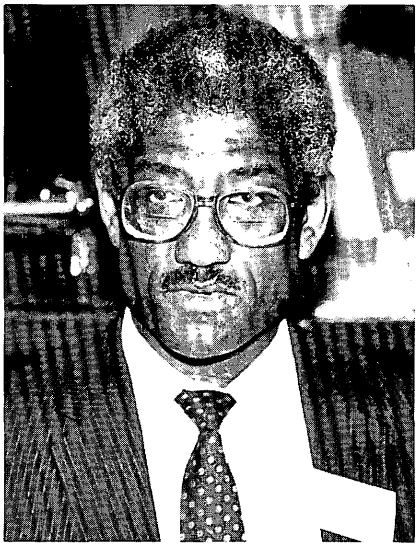
Recommendation 84-3: Improvements in the Administration of the Government in the Sunshine Act addresses two problems that were observed in a study of agency experience in administering the Government in the Sunshine Act. The first part of the recommendation encourages agencies to review their sunshine policies and practices to be sure (i) that the statutory exemptions are invoked only when there is substantial reason to close a meeting and (ii) that there is sufficient information available to enable public observers attending agency meetings to follow the course of discussion. In the second part of the recommendation the Conference concludes that one result of the Act has been a diminution in the degree of collegiality in the decision making process, and urges Congress to consider where the present restrictions on closing agency meetings need revision. If a new balance is be struck between the values of collegiality and of openness, the Conference suggests permitting some opportunity for closed meetings for discussions that are preliminary in nature, or involve matters such as budget and legislative proposals that are later to be considered in a public forum.

Members at the Twenty-eighth Plenary Session.



◀ THOMAS M. SUSMAN

MICHAEL B. WALLACE ▶



◀ EDGAR H. TWINE

Recommendation 84-4: Negotiated Cleanup of Hazardous Waste Sites Under CERCLA calls on the Environmental Protection Agency to emphasize the negotiation of voluntary cleanups of hazardous waste dump sites by private parties in its implementation of the federal "Superfund" program for cleaning up such sites. The recommendation suggests the use of outside convenors and mediators to facilitate negotiations, and describes additional steps EPA could take to encourage greater reliance on negotiated cleanups. The Conference also emphasizes the importance of insuring the involvement of local citizens in those aspects of cleanup negotiations that particularly concern them, such as the adequacy of remedial efforts.

CHAIRMAN LOREN A. SMITH CHAIRS THE TWENTY-EIGHTH PLENARY SESSION DURING DISCUSSION OF THE SUPERFUND PROJECT. SEATED AT THE DAIS (LEFT TO RIGHT): STAFF ATTORNEY MARY CANDACE FOWLER, CONSULTANT FREDERICK R. ANDERSON, JR., COMMITTEE ON JUDICIAL REVIEW CHAIRMAN H. CLAYTON COOK, JR., GENERAL COUNSEL RICHARD K. BERG, AND EXECUTIVE DIRECTOR STEPHEN L. BABCOCK.

SENATOR ALAN K. SIMPSON DELIVERS THE OPENING ADDRESS AT THE TWENTY-NINTH PLENARY SESSION.

TWENTY-NINTH PLENARY SESSION

Opening Address

Senator Alan K. Simpson opened the Session by sharing with the Assembly his insights regarding immigration law reform legislation. The Senator, co-sponsor of the Simpson-Mazzoli Bill on immigration reform in the 98th Congress, described the difficulties in trying to forge a legislative compromise on such divisive issues as amnesty for illegal aliens, employment of migrant farm workers, and asylum standards for refugees. Responding to an inquiry by Council Member Walter Gellhorn, Senator Simpson suggested the Conference might wish to consider studying asylum procedures, legalization processes, and immigration judge panels.

Recommendations Adopted

Recommendation 84-5: Preemption of State Regulation by Federal Agencies urges that Congress unambiguously state its intention regarding preemption whenever a regulatory statute is enacted. In those instances where federal agencies must deal with preemption issues, the Conference recommends that the agencies (i) establish procedures that will ensure adequate and explicit consideration of preemption matters in agency policymaking, (ii) avoid conflict between state and federal regulatory requirements through the use of informal dialog with state authorities, and (iii) provide to states notice and an adequate opportunity to participate in agency proceedings that may result in preemption of the states' laws or rules.

In *Recommendation 84-6: Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings,* the Conference concerns itself with the disclosure to counsel, under protective order, of confidential business information submitted to the ITC in antidumping and countervailing duty injury proceedings. To make its findings in these proceedings, the ITC depends heavily on voluntary submission of information by American firms. However, the risk that such information may be "leaked" to the firms' competitors when it is disclosed under protective order may discourage voluntary cooperation. The Conference recommends various measures to limit the exposure of confidential business information and to prevent unauthorized disclosures, by strengthening the obligation of attorneys receiving the information under protective order. The recommendation also proposes that the ITC (and, in one instance, the Court of International Trade) afford greater protection to the interests of submitters of confidential information by providing greater notice of the likelihood and extent of possible disclosure, and by assuring appropriate opportunities for submitters to object to disclosure. In addition, the Conference identifies certain areas in which the ITC might consider increasing the information disclosed under protective order.

Recommendation 84-7: Administrative Settlement of Tort and Other Monetary Claims Against the Government sets forth guidance for agency claims officers and attorneys regarding the presentation, investigation, and administrative assessment of monetary claims under the

Council Members at the Twenty-ninth Plenary Session

◀ MICHAEL R. GARDNER

EDWARD L. WEIDENFELD ▶

◀ T. KENNETH CRIBB, JR.

Federal Tort Claims Act, meritorious claims statutes, and similar laws. The recommendation calls for minor adjustments in the FTCA, certain agency practices, and the Department of Justice's regulations. The Conference's intent is to enhance usage of the administrative claims process by encouraging a perception among claimants that the process is fair and effective.

The recommendation calls on agencies to provide greater guidance to claimants about their rights, to help claimants to avoid running afoul of technical requirements, to promote mutual access to relevant information, to fairly and objectively determine the merits and monetary value of claims, and to avoid reliance on technical defenses that do not affect the merits. In addition, the Conference calls for Congress to make several changes in the FTCA's limitations periods in order to avoid injustice, as well as systematically to adjust ceilings on agencies' claims settling authority where inflation has rendered present monetary limits obsolete.

Recommendations Rejected

The Committee on Rulemaking proposed a recommendation on the subject of adjudication procedures in immigration cases. The Assembly debated the proposal, then acted to recommit the matter to the Committee along with a suggestion to broaden the study to include other areas of immigration practice.

Panel Discussion

The Session included a non-action item, a panel discussion on "Administrative Law Reform in the Next Four Years." The program began with presentations by three distinguished guest speakers: Christopher C. DeMuth, formerly Administrator for Information and Regulatory Affairs, Office of Management and Budget; Professor Richard B. Stewart, Harvard Law School; and Charles D. Ablard, Chairman of the American Bar Association Section of Administrative Law. Opening presentations were followed by questions and general debate by Conference members on the future direction of administrative law reform. In introducing the program, Chairman Smith announced his intention to solicit additional views on the subject from Conference members and other administrative law experts.

Mr. Ablard first noted a dramatic shift in interest away from the traditional "big seven" economic regulatory agencies. He suggested this trend will continue as a result of the deregulation movement. He predicted that attention will shift to the Department of Agriculture with its many programs regulating the production of various commodities, the Social Security Administration because of increasing concern with the problems of fairness and efficiency in the administration of "mass justice" programs, immigration issues for essentially the same reasons, and agencies concerned with international trade. Mr. Ablard then noted a recent heightened level of interest in judicial review of agency decisions, and described the comprehensive restatement of the standards of judicial review being undertaken by the American Bar Association. Finally, again touching on concerns with "mass justice," Mr. Ablard de-

scribed the apparent success of the British in using tribunals staffed by part-time, non-lawyer personnel, often drawn from the citizenry of the locality concerned with the dispute, to resolve a variety of "mass justice" issues and even some more complex types of cases.

Mr. DeMuth's remarks focused on executive branch review of rules, drawing on his experience in directing the centralized review function of OMB. He stated that the need for this function grows out of the massive "migration" of policy making from Congress to the executive branch which has resulted in the giving of power in these many areas not to the President, but instead to a large number of different agencies, each more concerned with its particular mission, and subject to influence by powerful special interest groups.

As the cumulative impact of the decisions made by these various fragmented and specialized centers of power has increased, recent presidents have increasingly perceived a political necessity to assert control over that for which they are now being held politically accountable. In addition, he noted, scholars have increasingly thought that the effects of many regulatory schemes were either anticompetitive, perverse to their stated goals, cost-ineffective, or sometimes even guilty of all of these at the same time.

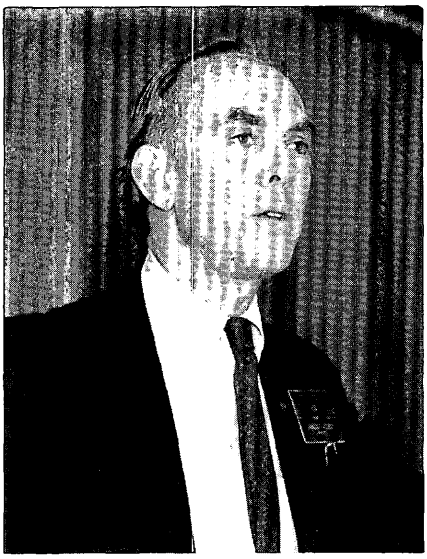
Mr. DeMuth concluded from these premises that central oversight of agency rulemaking will continue to be strengthened in the current administration and in future administrations, regardless of political orientation. Congressional criticism will continue, but attacks will concentrate less on the general principle of central oversight and more on the validity of particular decisions made by the incumbent president. Oversight will be strengthened out of necessity, he added, because, as direct taxation becomes less and less feasible due to budgetary constraints, indirect taxation through regulatory fiat will become an increasingly attractive alternative.

These forces, he predicted, will result in the statutory creation of substantially strengthened control mechanisms, with the central authority having more involvement at the beginning of the policy making process, rather than, as at present, having only a role of reviewing a proposal already formulated. Since rulemaking is, in effect, delegated legislation, Congress will also increase its role in this process, giving itself some more efficient form of sanctions and access to agency documentation, while the President will argue for statutory authority to impose stringent cost/benefit analyses and the authority to review regulations of the "independent" regulatory agencies.

To Professor Stewart, the third panelist, a key source of future activity in administrative law reform will be the need to relieve the administrative law system's current state of overload. He called attention to the many rights of judicial challenge afforded in various environmental statutes and newly-enacted laws regulating social conduct, and characterized the present system as being one of "central government planning through litigation."

Counter-trends to "government by litigation" which may ameliorate its unfortunate effects include: deregulation, increasing presidential control of agency policy making, the growing use of mediation and negotiation techniques, and the notion that the federal government should use state, local, or private means for dealing with members of

Panelists discuss the future of regulatory reform.



◀ CHARLES D. ABLARD

CHRISTOPHER C. DEMUTH ▶

◀ RICHARD B. STEWART

the public and firms.

In conclusion, Professor Stewart reemphasized the need to change the current state of "central planning by litigation" by calling attention to the tremendous amount of litigation associated with social security disabillity claims, and the existing "jerry-built" system of statutes and court-made law on the subject of governmental liability in the fields of contracts, constitutional torts, and torts of the traditional type.

Chairman Smith then opened the discussion for comments from the floor. Judge Stephen Breyer asked whether, in the emerging problem area of toxic torts, the panelists' comments about mass justice might suggest that the federal government should establish a system of administrative determinations, with damage awards to be taken from a fund created by industry contributions. He noted that, in similar situations processed through traditional court litigation, approximately 40 percent of the total expense is said to be consumed by lawyers' fees. Council Member James C. Miller III then urged the Conference to study the entire notion of non-lawyer representation, not only as it might apply to toxic torts. Betty Jo Christian, Chairman of the Committee on Regulation which had reviewed the non-lawyer representation issue earlier in 1984, commented that the area was ripe for further study, although the area of representation by experts—the area considered by the committee—did not seem to warrant further attention.

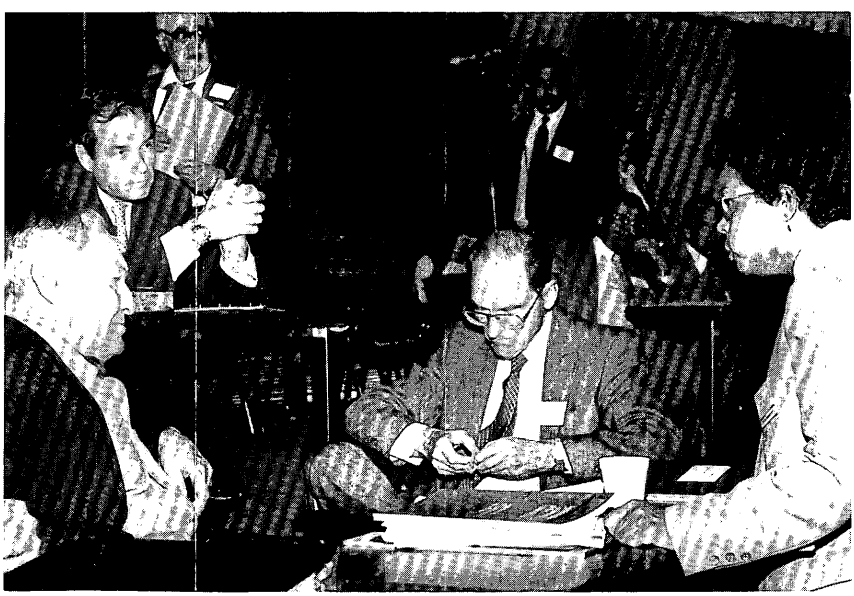
Alan B. Morrison, Public Member, commented that he also believes that the issue of non-lawyer representation in mass justice programs is important. But, he believes, the real problem is not in the representation of clients before courts or tribunals, but in the area of providing advice and assistance to clients prior to litigation, which would perhaps avoid entirely the need for judicial or quasi-judicial proceedings.

Mr. Morrison then returned the discussion to the issue of presidential control of rulemaking, the topic of Mr. DeMuth's remarks, agreeing that central control was the wave of the future. He asked whether it is necessary to locate the reviewing authority within the Office of Management and Budget, which has an inherent bias against regulation due to OMB's role as the controller of government spending in the budget area. Mr. DeMuth responded that he thought that this bias is indeed necessary, because of the pro-regulation bias that he believes inevitably affects an agency with responsibility only for a particular area.

Both Mr. Ablard and Professor Stewart then reiterated their beliefs that non-lawyer representation in mass justice programs is a very important area for Conference efforts in the next few years.

Conference Chairman Smith closed the discussion by commenting that the presentations and remarks from the floor had indeed been valuable in giving the Conferences ideas on important areas for study in the future. He noted that these suggestion were generally aimed at perfecting the existing system by making minor adjustments, and he questioned whether they went far enough. "Have we really decided that this is the universe that we plan to live with for the foreseeable future, with a few minor adjustments and perfections; or do we need to think on a bolder level? Perhaps the whole system, the whole structure and conceptual framework of administrative law today is outworn, is not as it should be, and needs to be rethought in a most fundamental way."

ATTORNEY GENERAL WILLIAM FRENCH SMITH ADDRESSES THE ASSEMBLY AT THE TWENTY-EIGHTH PLENARY SESSION. SEATED (LEFT TO RIGHT): CHAIRMAN LOREN A. SMITH, GENERAL COUNSEL RICHARD K. BERG, EXECUTIVE DIRECTOR STEPHEN L. BABCOCK, SPECIAL PARLIAMENTARIAN ROGER MOORE.



MEMBERS CONFER WITH KENNETH CULP DAVIS (SEATED, CENTER) DURING A BREAK AT THE TWENTY-EIGHTH PLENARY SESSION. LEFT TO RIGHT: WARNER W. GARDNER, PAUL R. VERKUIL, MALCOLM S. MASON, MR. DAVIS, SALLYANNE PAYTON.

Recommendation 84-1: Public Regulation of Siting of Industrial Development Projects *(Adopted June 28, 1984)*

Major industrial development projects often have significant environmental effects and require permit approvals and preparation of environmental reviews by agencies under legislation such as the National Environmental Policy Act (NEPA) and the Clean Air Act. Although governmental permitting and review processes—aimed at protecting the environment, reducing safety risks, and assisting the planning of livable communities—necessarily extend the time required to complete projects, unnecessary delays associated with the complexity of lengthy processes can have serious negative consequences. Project costs can rise dramatically over initial estimates, resulting in increased costs to consumers for the products or services eventually delivered. Project approval delays have led to pressure to circumvent environmental laws by means of special legislation for particular projects or types of projects. The consuming public can further suffer from process delay by being deprived for substantial periods of time—and, in cases of project abandonment caused by delay, forever—of the benefits of emerging new technology. The Administrative Conference [1] believes that, when many agencies at different levels of government must approve a project proposal, the complexity and uncertainty of the process can be reduced through an appropriate degree of interagency coordination and the use of adequate procedures.

INTERAGENCY COORDINATION

Many federal, state, and local agencies must review environmentally sensitive industrial projects. Project developers need assistance in determining which agencies must be consulted for project approval, what permits are required, what applications must be completed, and what information is needed for each application. Developers' informational needs could be met by a clearinghouse established at the level of government closest to initial project review.

When relatively few agencies must consider a project application,

[1]Congress requested that the Administrative Conference (ACUS) work cooperatively with the Advisory Commission on Intergovernmental Relations (ACIR) toward resolving regulatory conflicts and overlap among federal, state, and local agencies. ACUS and ACIR were specifically asked to address the issue of streamlining the permit process based on approaches that lead to improved intergovernmental cooperation. Congress was concerned with the complexity and costs associated with the permit process in the review of energy and port development projects. Congress expects ACIR and ACUS to work together to assess alternative ways to resolve intergovernmental problems and conflicts in permitting. In conducting this joint effort, the agencies have sought and will continue to seek the input of business, government, and environmental experts. House Committee on Appropriations, Report on Treasury, Postal Service, and General Government Appropriation Bill, 1983, H.R. Doc. No. 854, 97th Cong., 2nd Sess. 39 (1982). ACIR has cooperated in the development of this recommendation, but has not formally adopted the recommendation at this time.

agreements can be worked out among the agencies to coordinate agency review or to resolve jurisdictional or interpretative conflicts. These agreements can facilitate more timely project review, reduce overlapping review, decrease uncertainty, and provide for joint state-federal agency review of a project.

When many agencies with different responsibilities, distinct agency missions, and different governing statutes must approve a project proposal there is a strong need for coordination. Selection of a coordinating agency early in the application process is desirable to facilitate the permitting process. The coordinating agency can facilitate the exchange of information, can encourage more efficient review, and can reduce mistrust by scheduling regular face-to-face meetings among the project developer, governmental agencies, interest groups, and residents of the community in which a project is to be located. The coordinating agency often will have permitting duties but may be a non-permitting body such as the Colorado Joint Review Process.[2] To be effective a non-permitting body must be supported by key governmental leaders in the jurisdiction. The coordinating agency may be a body different from the clearinghouse agency or the lead agency for environmental review preparation.

PUBLIC PARTICIPATION

Citizens of the community in which a project is to be sited have a strong interest in the project and will seek information about the project particularly when it has major environmental effects. Environmental groups and other members of the public also have similar interests. Severely limiting legitimate public participation can unnecessarily increase opposition to a project and can lead to lawsuits to stop a project. Facilitating public participation can reduce fears and concerns, can mitigate the not-in-my-backyard attitude of a community, and can lessen public mistrust of the developer and government. The public can also contribute useful information to a project. Developers can allay concerns by sharing information about their project with the public and can work more effectively by cooperating with the community in which a project is to be sited. Public participation at an early stage of agency review ensures that changes can be made before substantial developer funds are committed to a specific project design. Public participation can be enhanced when meetings or hearings are held in the project community and when the agency designates a public advisor to help citizens understand the process.

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[2]The Colorado Joint Review Process (JRP) is an innovative new approach to coordinating governmental review of energy projects. Originally part of the Colorado Department of Natural Resources, it is now a wholly separate body, fully supported by the Governor and other key state officials. The JRP has no permitting responsibilities but performs a coordinating role and operates on a voluntary basis. A developer must choose to have its project application accepted into the JRP. The JRP works with the developer, the public, and all levels of government to identify affected agencies and permit processes, to determine what environmental and other issues must be addressed, to clarify what information is necessary, and to establish a decision schedule for all governmental review processes that must be completed for that project. The JRP sponsors periodic meetings with all affected actors and otherwise seeks to ensure a smoother and more organized review.

Environmental Review

Under the provisions of NEPA and similar state legislation, environmental reviews often must be prepared by agencies prior to approving a project application. When both federal and state environmental review statutes apply to a project application, preparing a joint review can reduce duplication and overlap. The approach taken in the regulations of the Council on Environmental Quality—in which a "lead agency" is designated to coordinate the preparation of an environmental impact statement—provides an excellent model adaptable even when there is no major federal interest in a project. Early identification of environmental impacts through the "scoping of issues" process facilitates statutory compliance and allows project changes by a developer when they are least expensive. Identifying commenting agencies early in the process ensures that the concerns of every agency are addressed in the review. Face-to-face meetings of all participants in the review process are useful for identifying impacts, exchanging information, and getting to know the other participants in the process and their concerns. The lead agency can ensure a more timely review process by negotiating a decision schedule—in which a completion date for each step of the process if agreed upon—with the project proponent, other agencies, and representatives of other identified interested groups. The lead agency can play a major coordinating role by identifying other agencies, setting up meetings, organizing the stages of review preparation, and negotiating decision schedules for each stage.

Permit Approvals

Developers must file applications in which they provide information about their project. Developers and agencies may disagree as to what information is required and how much information is adequate for a complete application. There may also be uncertainty over procedural and substantive requirements that must be met. Agencies can assist developers by specifying in advance the information needed for an application to be complete and the standards that must be met for a permit to be approved. The agency can clarify what is required by holding pre-application meetings with developers. The agency can resolve informational, procedural, and substantive problems by holding post-application meetings with the developer. Agencies need adequate information and full cooperation from developers to make permitting or compliance decisions. Duplication, overlap, and paperwork can be reduced if agencies with joint permit responsibilities for a project adopt common application requirements, standardized information requirements, and common procedures such as joint hearings. Sharing of staff and budgetary resources can make these approaches easier to implement.

Time Limits for Decisionmaking

Legitimate concerns are expressed by developers and others that too much time is required by agencies to review and permit major industrial projects. Legislatures have reacted by passing time limit statutes that

mandate an agency's preparation of an environmental review or action on a permit application within a set period of time.[3] When setting a time limit by statute, a legislature must be sensitive to the agency's needs by allowing in the statute sufficient time to complete the decision—including time that may be required for action by other agencies that have concurrent review responsibilities, by giving the agency adequate resources, and by allowing the agency flexibility to extend the deadline for good cause. Agencies often have the most knowledge about how long a particular type of decision can take, and agencies can specify by regulation an appropriate time limit. Agency compliance with time limit statutes can be monitored if the legislature requires agencies periodically to report their performance under the statute and to identify any problems encountered in meeting the time limits.

An alternative to mandated statutory time limits is a requirement that agencies establish decision schedules which set deadlines for the completion of specific actions (e.g., comment periods, drafting of required agency reports) within each phase of project review. A decision schedule is desirable because it is individualized for each project and because it requires the developer and all responsible agencies to make commitments to meet the agreed schedule. Commitment by the developer is crucial since developers can speed up or slow down development of a project depending upon internal or external economic considerations. Also some agencies may not be sufficiently committed to timeliness; if agencies are required to agree to a schedule, they are more likely to make that commitment.

RECOMMENDATION

These recommendations are directed primarily to federal, state, regional, and local agencies that have permitting and environmental review responsibilities. In addition, many of the time limit recommendations are directed to Congress and state legislatures. To the extent statutory changes are necessary to implement the other recommendations, they are also directed to the appropriate legislative bodies.[4]

A. *Interagency Coordination*

1. Clearinghouses should be established at the level of government closest to initial review of a particular project to provide information to project developers about applications, agencies to be consulted, and permitting requirements.
2. Agencies should make agreements to coordinate review of a particular project, or to resolve jurisdictional or interpretive conflicts.

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[3]In Recommendation 78-3 the Conference stated: "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activity where a delayed decision would deprive both the applicant and the public at large of substantial benefit." 1 CFR 305.78-3, para. 3. These concerns for timeliness are particularly pertinent here.

[4]See statement regarding joint ACUS—ACIR effort in note 1.

3. A coordinating agency should be selected to coordinate governmental review of projects when many agencies are involved. The coordinating agency may be either a permitting or a non-permitting agency.
4. The coordinating agency should schedule regular face-to-face meetings among developers, agencies, and the public.
5. The Colorado Joint Review Process approach (note 2, *supra*) in which a non-permitting agency coordinates project review by all agencies is one possibility that should be considered.

B. *Public Participation* [5]

1. In order to facilitate approval processes, agencies with permitting and environmental review responsibilities should solicit and consider the views of public participants, including citizens of the community in which a project is to be sited.
2. To make public participation more meaningful, agencies should develop procedures such as holding local meetings or hearings and designating public advisors who can provide assistance on procedural aspects of agency proceedings to participants.
3. Agencies should encourage developers to provide information to the community about a project application and to be responsive to legitimate community concerns.
4. Agencies should ensure that public participation occurs at an early stage of project review and developer planning so that changes in project design can be made before substantial funds are committed to a specific project design.

C. *Environmental Review*

1. When several agencies are involved in environmental review preparation for a single project, a lead agency (federal, state, regional, or local, as appropriate) should be designated to coordinate the activities. The approach taken in the regulations of the Council on Environmental Quality (40 CFR Parts 1500–1508) is recommended, even when a formal environmental impact statement is not required.[6]
2. The lead agency should identify commenting agencies and should schedule face-to-face meetings of all participants in the review process.
3. The lead agency should utilize the scoping of issues process to identify environmental impacts early in the review process before a draft review is prepared.
4. The lead agency should negotiate decision schedules—setting deadlines for completion of scoping, draft review preparation and comments, final review preparation and comments, and issuance of a review—with the developers, all affected agencies, and representatives of other identified interested groups.

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[5]This part does not overrule or supersede *Recommendation 71-6: Public Participation in Administrative Proceedings* (1 CFR 305.71-6).

[6]The Conference is not suggesting that an environmental impact statement be prepared when none is required by law, but only that, if environmental review is to involve several agencies, a lead agency be selected.

5. When appropriate, agencies should agree to prepare joint state-federal environmental reviews.

D. *Permit Approvals*

1. Whenever feasible permitting agencies should specify in advance what informational, procedural, and substantive requirements will apply to a particular permit application.
2. Agencies should be available for pre-application meetings with the project developer to clarify informational, procedural, and substantive requirements.
3. Within a short period of time after the filing of an application, agencies should determine whether the application is complete. Agencies should hold post-application meetings with developers to discuss procedural, informational, and substantive deficiencies in an application, and should promptly advise developers of any deficiencies throughout the pendency of the permitting process.
4. Agencies should make clear to developers that the developers must supply necessary information in an application and that their cooperation will greatly assist in the permitting process.
5. Whenever feasible, agencies with joint permitting responsibility for a project should be encouraged to reduce duplication and paperwork by accepting common applications, by standardizing informational requirements, by using in one agency proceeding relevant information developed in the proceeding of another agency, and by adopting common procedures such as joint hearings.

E. *Time Limits for Decisionmaking* [7]

1. Agencies should negotiate a decision scheduled with the project developer, all affected agencies, and representatives of other identified interested groups within existing statutory deadlines. The schedule should set a deadline for the completion of specific stages of project review. The schedule should be contained in an agreement in which the developer and the agencies make a commitment to meet the deadlines.
2. If a legislature [8] wishes to limit the time available for a proceeding, it is preferable that the statute require the agency to fix the time limit by rule, rather than to specify the time limit in the statute itself.
3. A legislatively mandated time limit should allow an appropriate amount of time for the type of decision involved, should specify the consequences of not meeting the time limit, and should provide the agency with the option of extending the time limit for good cause explicitly stated.
4. Legislatures should provide adequate resources for agencies to meet time limit requirements and should periodically review agency compliance with time limits.

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[7]See generally, *Recommendation 78-3: Time Limits on Agency Action* (1 CFR 305.78-3), which is consistent with this part.

[8]As used here, "legislature" includes Congress, as well as state, regional, and local legislative bodies.

Recommendation 84-2: Procedures for Product Recalls

(Adopted June 28, 1984)

Each year manufacturers recall millions of consumer products—ranging from toys and household appliances to drugs and autos—under an array of federal health and safety statutes. Most recalls are undertaken voluntarily, either on the manufacturer's own initiative or at the urging of a federal agency with recall authority. The recall remedy, while a valuable enforcement tool, is also one that is difficult to implement. A recall must be undertaken promptly if it is to serve its purpose of preventing injury. Further, to be effective, it must be implemented in a way that encourages public responsiveness.

For purposes of this recommendation, the term "recall" encompasses a variety of post-sale remedial actions by manufacturers and sellers of products, including: (1) notifying consumers of problems or potential problems with products; (2) offering to repair products; and (3) offering to refund the cost or to replace products. The recommendation is based, in part, on a study of the recall programs of three federal agencies that account for the great majority of recalls—the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC).[1] Each of the three agencies studied has the authority to order at least one of the post-sale remedial actions noted above. Each is actively involved in recalls of consumer products that pose health or safety risks to the general public, instances where the need for effective use of the recall remedy is the greatest and its implementation is the most difficult. However, these recall programs differ with respect to standards for ordering recalls, the scope of the remedy, and administrative procedures. Some of the differences are statutorily based; others grow out of varied methods of implementing the programs.

Although all three agencies make extensive use of recalls to implement their statutes, recalls have certain inherent limitations as enforcement tools. Consumers can, and sometimes do, render them ineffective by failing to respond. Further, recalls generally work well only if they are undertaken promptly and after a minimum of agency prodding. Recalcitrant firms can often thwart the effectiveness of the remedy merely by invoking available administrative procedures. There are a number of reasons for firms to be recalcitrant when faced with a possible recall. Companies may not enjoy much protection against product liability claims by recalling defective products—indeed, recalls can stimulate additional law suits. Recalls often bring adverse publicity, and they can be very expensive, requiring refunds or replacements of products that have already been produced and marketed.

Because recalls often work better than other remedies, however, they are a major enforcement tool of the three agencies studied. There are a number of reasons for their popularity. From the agencies' standpoint:

- Recalls do promote safety. Although response rates are lower than agencies would like, consumers in significant numbers do return or discard recalled products or use them more safely.

[1]Other agencies that engage in product recalls include EPA, FAA, HUD and USDA.

• Recalls establish precedents for what constitutes an unacceptably hazardous product.
• Recalls operate more quickly and efficiency than most standard-setting. In recall cases, government and industry often share a sense of urgency that a hazardous product should be removed from the marketplace. This has led agencies to adopt informal, flexible settlement procedures which have made it easier for companies to agree to undertake recalls.

Industry also may prefer recalls to standards as an enforcement tool because recalls generally affect only the makers of unsafe products rather than all product manufacturers. Recalls, unlike many standards, do not impose across-the-board certification requirements and may impose fewer recordkeeping requirements.

Agencies must reconcile several interests in implementing their recall programs. They must be sensitive to the potential for consumers to disregard recalls if the remedy is overused. They must stress voluntary agreements to achieve prompt—and therefore effective—recalls, yet be willing to use their enforcement powers if voluntary efforts stall. They must be flexible in negotiating the terms of recalls to encourage voluntaryism, yet assure that the notice and remedy are adequate to inform and protect product owners.

In general, agencies should work together to develop a more uniform approach to recalls. Despite the differences in the agencies' programs, they share common characteristics and goals, and they must all deal with the general public. Agencies could benefit from sharing with each other what they have learned about recalls, and the public could benefit from more consistency in the recall programs.

Agencies should also consider publicly classifying their recalls according to risk to help the public assess the hazards of recalled products. While this approach may present some problems in negotiating recalls, it recognizes the important role the consumer plays as a partner with government and business in the recall process and the need to provide that partner with adequate information.

Moreover, additional enforcement tools are warranted for some agencies. As a practical matter, agencies cannot bring many enforcement actions, but the availability of these additional powers, and their occasional use when necessary, can assist agencies in negotiating voluntary recalls and in carrying out the overall aims of the recall programs. Even a relatively small number of enforcement actions ultimately serves the broader aim of encouraging voluntary compliance by others, and should therefore be streamlined where possible.

Three procedural reforms are recommended for the consideration of agencies with recall programs. First, such agencies should consider seeking broader statutory authority to require manufacturers to report safety defects. A provision similar to Section 15(b) of the Consumer Product Safety Act, which requires reporting of defects that "could create" a potential hazard, would give agencies earlier warning of defects and reduce their information gathering burden, without changing the standard for recalls.

The second recommended change would give agencies additional authority in cases involving or imminent safety problems. In general, if a

case must be taken through both administrative and judicial proceedings, the process may be so lengthy that the recall could be ineffective, since most of the injuries will have occurred and the response rate will be low. Therefore, agencies should consider asking for authority in especially hazardous cases to bypass the administrative hearing and to seek court-ordered recalls.

The third general reform is based on the premise that the availability of a variety of enforcement tools, such as court-ordered seizures and civil penalties, helps to induce voluntary cooperation with an agency's recall program. Seizure is not always an effective tool, however, unless the agency is able to detain products administratively at the point of distribution prior to filing a seizure action. CPSC and FDA, which have authority to seek court-ordered seizures, should consider the desirability of detention authority where it would aid their use of this enforcement tool. FDA should also consider seeking civil penalty authority for statutory violations where it now only may seek criminal penalties.

Paragraph B4 of the recommendation is addressed specifically to the CPSC. The CPSC enforces four significant safety statutes: the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act (FFA), and the Poison Prevention Packaging Act (PPPA). Both the CPSA and the FHSA give the agency the authority to order recalls, and this has become a favored enforcement tool of the agency. Under these two Acts, if a voluntary recall is not achieved, the agency must conduct a formal administrative hearing prior to ordering a recall. Under the CPSA, the agency may go directly to court to seek a recall if the product involved is "imminently hazardous." Under the FHSA, the agency may proceed administratively against imminently hazardous products. Neither Act contains a judicial review provision, with the result that "non-statutory" review of agency recall orders occurs in the United States District Courts. The absence of a judicial review provision for recall orders under the CPSA and FHSA should be corrected. Congress should provide for judicial review in the United States Courts of Appeals under 5 U.S. Code § 706.[2] This would eliminate the existing, lengthy, two-tiered judicial review procedure. The FFA and PPPA omit recall provisions entirely, causing uncertainty as to the Commission's ability to use recalls against unsafe products governed by either of these Acts. It would promote recall uniformity and reduce delay if the Commission could address the risks posed by all products under its jurisdiction under the procedures of Section 15 of the CPSA.

RECOMMENDATION

A. *Coordination of Recall Activities*

1. *Interagency recall liaison group.* A group consisting of representatives from all agencies with recall programs should be established to inform each other about their programs and to share research in areas of common interest, such as how to im-

[2]See *Recommendation 75-3: The Choice of Forum for Judicial Review of Administrative Action,* 1 CFR 305.75-3.

prove consumer response rates and how to use new technology to improve recall notification.

2. *Recall notices.* Recall notices should clearly describe the nature of the defect and the nature and extent of the risk of harm that prompts the recall. Individual agencies should consider whether their mission would be advanced by classifying recalls according to risk. The interagency liaison group could explore the possibility of coordinating the classification systems so that the agencies use similar terminology to designate levels of risk.
3. *Improved handling of consumer inquiries and complaints.* Consumers do not always know which agency takes complaints or has information about recalls. Agencies with recall programs should establish a central interagency switchboard to take all calls and refer them to the appropriate agency. As an alternative, agency personnel designated to receive inquiries or complaints relating to product defects should be made aware of the recall programs of other agencies, so that inquiries or complaints will be referred to the proper office.
4. *Publicizing recalls.* Each agency should seek to develop a method of publishing periodically an up-to-date list of active recalls within the agency's jurisdiction.

B. *Procedural Improvements*

1. Agencies with recall programs should consider whether to ask Congress for authority to require manufacturers to give such agencies information in their possession about potential safety-related defects in their products which could create a substantial risk of injury to the public. Such authority, if granted, should be accompanied by appropriate incentives for compliance.
2. Agencies with recall programs for defective products should consider whether to ask Congress for authority to bypass administrative hearings and to seek court-ordered recalls in cases of serious safety problems as defined by the relevant statute.
3. Agencies authorized to seek seizures should consider whether to ask Congress to augment their seizure authority by giving them the power to detain defective products administratively prior to seizure.
4. Congress should streamline the Consumer Product Safety Commission's recall authority by amending the Consumer Product Safety Act (a) to give the Commission specific authority under that Act to seek recalls of all products within its jurisdiction, including those now subject to the Federal Hazardous Substances Act, the Flammable Fabrics Act and the Poison Prevention Packaging Act; and (b) to provide for judicial review of agency ordered recalls in the United States Court of Appeals under 5 U.S. Code § 706.
5. The Food and Drug Administration should consider whether to ask Congress for civil money penalty authority as an option where only criminal penalties are now available.[3]

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[3]See *Recommendation 72-6: Civil Money Penalties as a Sanction,* 1 CFR 305.72-6.

6. The foregoing recommendations are not intended to encourage agencies to use recalls as a substitute for rulemaking, but merely to streamline the process of obtaining recalls where appropriate.

Recommendation 84-3: Improvements in the Administration of the Government in the Sunshine Act *(Adopted June 28, 1984)*

A. PERIODIC AGENCY REVIEW OF SUNSHINE PRACTICES

Members of the public voice several criticisms of the manner in which agencies employ the Government in the Sunshine Act and conduct open meetings. Among the most significant are that meetings are often closed on technical legal grounds without substantive reason for doing so, that at times discussion in meetings is inadequate to allow those in attendance to understand fully the proceedings, and that frequently members of the public have insufficient access to explanatory materials and underlying documents to allow them to follow the discussion and comprehend the content of meetings. At issue is not so much compliance with the letter of the law as progress toward fuller realization of its general objective of enlarged, meaningful public access to information. To the extent that problems exist, they are a function of agency practice and are appropriately addressed in their particulars on an agency-by-agency basis.

B. IMPACT OF SUNSHINE ON THE COLLEGIALITY OF AGENCY DECISION MAKING

The desirability of the collegial form of agency organization, as opposed to the agency headed by a single executive, has long been the subject of debate. Congress has, however, chosen to delegate certain administrative functions to collegial bodies.

One of the most frequently offered justifications for collegial decision making is that stated by the First Hoover Commission's Committee on Independent Regulatory Commissions:

> A distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best, each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience. . . . The member of the commission must expose his reasons and judgments to the critical scrutiny of his fellow members and must persuade them to his point of view. He must analyze and understand the views of his colleagues if only to refute them.

Though no generally accepted standard for measuring the quality of agency decisions under the Government in the Sunshine Act has been devised, one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decision making process. The open meeting requirement has generated reluctance to discuss certain important matters; and discussions, when they occur, may not contribute to achieving a consensus position. In some agencies the pattern of decision making has shifted from collegial exchanges to one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation procedure. The inhibition of collegial exchanges, in turn, impedes the mem-

bers in the collective exercise of their responsibilities, and tends to weaken the role of the collegium vis-a-vis that of the staff and the agency chairman.

Congress was aware of the inherent and unavoidable tension between the values of openness in government and collegiality in decision making when it enacted the Government in the Sunshine Act, and it consciously chose a result that would maximize openness. Concessions were made in the statute to the need for maintaining the confidentiality of certain categories of information under discussion, but few if any concessions were made to the needs of the deliberative process as such. Although the legislative history indicates Congress believed that, after the initial period of adjustment, sunshine would not have a significant inhibiting effect on collegial exchanges, unfortunately this has not been the case.

RECOMMENDATION

1. Agencies should continually strive to reflect fully in their activities the basic purpose of the Government in the Sunshine Act, which is to enlarge public access to information about the operations of government. Agencies are strongly encouraged to review periodically their sunshine policies and practices in light of experience and the spirit of the law for the purpose of making adjustments that would enlarge public access to meaningful information, such as (a) invoking the exemptions of the Act to close meetings only when there is substantial reason to do so; and (b) making open meetings more useful through comprehensible discussion of agenda items and provision of background material and documentation pertaining to the issues under consideration.
2. Under the Government in the Sunshine Act the degree of collegiality in the multi-member agencies has diminished. Congress should consider whether the present restrictions on closing agency meetings are advisable, and, if not, how they might best be revised without undercutting the basic principle of the Act that "the public is entitled to the fullest practicable information regarding the decision making processes of the Federal Government."

   If a new balance is to be struck between the values of collegiality and openness, the Administrative Conference suggests that agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities (including enforcement priorities) in closed meetings, when the discussions are preliminary in nature or pertain to matters, such as budget or legislative proposals, which are to be considered in a public forum prior to final action.

Recommendation 84-4: Negotiated Cleanup of Hazardous Waste Sites Under CERCLA *(Adopted June 29, 1984)*

By enacting the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980, Congress undertook to provide a federal solution for the problem of abandoned and inactive hazardous waste disposal sites. Approximately 2,000 sites will require action, at a cost of tens of billions of dollars. CERCLA created a $1.6 billion revolving "Superfund" for direct federal action to clean up these sites and respond to hazardous waste emergencies. The act supplements this public works authority with provisions for negotiating cleanups by "potentially responsible parties"—site owners and operators and users of sites such as transporters and waste generators. It also empowers the federal government to sue such parties for the cost of cleanups paid for out of the Superfund and, if waste disposal may present an "imminent and substantial endangerment," to sue for orders directing responsible parties to clean up sites themselves. The act is administered by the Environmental Protection Agency (EPA).

By early 1984, although EPA had responded to hazardous waste emergencies at many sites, only a handful of sites listed on a statutory national priority list by the agency had been completely cleaned up by the federal government. A few more sites had been cleaned up by private parties. The causes of delay were varied: uncertainty about the extent of the problem and the efficacy of technical remedies; start-up problems inherent in a new program; and a two-year long effort to negotiate cleanups so that no Superfund revenues would have to be spent. By mid-1983, the strategy of conserving the Superfund had fallen apart amidst a major leadership crisis within the EPA. In a policy reversal, Superfund expenditures for cleaning up sites then took priority over other means available under the statute for effecting cleanups.

The current agency approach to CERCLA emphasizes cleanups paid for out of the Superfund coupled with actions to recover the expenditures, but also relies to a limited extent on negotiated cleanups and on lawsuits to compel responsible parties to act under CERCLA's imminent endangerment provision. This strategy has resulted in a CERCLA implementation effort that is slow and expensive.

Congress, the EPA, responsible parties, and other critics have suggested several means of speeding up and economizing on site cleanups. These include enlarging the Superfund, setting program deadlines, expanding the EPA program offices, empowering citizens to sue, and encouraging voluntary cleanup by industry. Although enlarging the Fund, providing more staff, and setting program deadlines would tend to accelerate the CERCLA effort, the Administrative Conference believes that a properly designed site cleanup negotiation process, through which responsible parties or third parties would agree to act directly to clean up sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector. Involvement of the federal government and affected citizens in this process would ensure adequate protection of public health and the environment.

Although current EPA policy permits the negotiation of cleanups, the agency puts too little stress on negotiations and has adopted a series of

procedural and substantive requirements that unnecessarily constrict the number of negotiated cleanup agreements that the agency might beneficially conclude. The Conference recognizes, of course, that successful negotiations can only occur when private parties as well as the federal government are willing to respond to the problem of hazardous waste cleanup in good faith. The Conference intends no criticism of aggressive EPA enforcement efforts where responsible parties refuse to cooperate.

In this recommendation the Administrative Conference suggests a series of steps that the EPA might take to encourage and facilitate greater reliance on negotiated private party cleanups, in those situations where negotiations have a realistic chance of success.

RECOMMENDATION

1. The Environmental Protection Agency (EPA) should emphasize the negotiation of voluntary cleanups at hazardous waste dump sites. The negotiation process for any site should include, at an appropriate time and in an appropriate manner, the key interests, such as federal, state and local governments, parties potentially responsible for cleanup (including site users, site owners and operators, and waste transporters), and local citizens. Whenever possible, efforts to negotiate a cleanup agreement should begin well before the commencement of litigation concerning a site. To increase the likelihood that negotiations will succeed, the Administrator and other leading EPA officials, both at headquarters and in the regional offices, should support the negotiation process, follow its implementation, and be available to explain specific negotiated agreements before congressional oversight committees if necessary.
2. Citizens living in the vicinity of or otherwise directly affected by a site have a substantial interest in some issues related to the cleanup process—for example, medical diagnostic testing, relocation of public service facilities, measures to isolate the site, and the overall adequacy of the cleanup effort. Their interest in other aspects of the process, such as the allocation of costs among potentially responsible parties (or between potentially responsible parties and the government), is more problematic. EPA should consider means beyond complete reliance on local political institutions for involving these citizens, including the negotiation of collateral arrangements, participation of citizens groups in negotiations over the type and scope of the remedy, and the like. Even if not participants, local citizens ordinarily should be permitted to observe those aspects of the negotiations that concern them.
3. Many negotiations can be conducted by EPA without outside assistance. In other cases, where outside assistance is desirable, EPA should encourage efforts by independent mediating organizations or individuals to convene negotiations. This can be accomplished by asking such a convenor at an early stage—no later than the commencement of "remedial investigations and feasibility studies" (a statutory cleanup stage)—to determine whether conditions are favorable for negotiations at a site. Favorable conditions in-

clude: issues that are ripe for decision; absence of fundamental conflict about values among those with a stake in the outcome; adequate representation and organization of key interests; opportunity for mutual gain for those with a stake; a balance of power among participants; willingness to bargain in good faith and share information; and willingness of units of government to participate as equal parties. Where negotiation appears feasible, the convenor should attempt to organize a site negotiation group from among the parties with a stake in the site cleanup. If an initial meeting of the parties is successful, the participants should consider retaining the convenor or another person to serve as mediator for the duration of negotiations. EPA should consider using Superfund resources to support an entity, such as a non-profit corporation or another agency, that would undertake this initial convening effort and provide mediation services if the parties desired them. Alternatively, EPA should consider providing these services through personal service contracts with skilled mediators.

4. In order to take advantage of private funds and expertise while they remain available, EPA should encourage and participate in negotiations for cleanup of sites where there is a high likelihood of successful negotiations, even if they have not yet been allocated federal funding for remedial investigations or been added to the National Priority List, unless such negotiations will distort the agency's priorities by diverting substantial agency resources or causing undue delay.
5. EPA should avoid wasting agency resources on unproductive negotiations by establishing, with the concurrence of other negotiating parties, reasonable deadlines for the conclusion of negotiations.
6. Successful negotiation requires that participation by all interests be through persons who, if not principals, have the confidence of, and easy access to, principals with the authority to make binding commitments. For EPA, the negotiators or persons readily accessible to the negotiators should have explicit, broad delegated authority to commit the agency to a negotiated outcome. To the extent that peer review and approval of agreements within the agency are nonetheless required, EPA should provide expedited means for obtaining them. One method of achieving this end would be for EPA headquarters to consolidate review of negotiated cleanups in a single panel of key officials.
7. The final agreement should take the form of an administrative consent order under section 106 of CERCLA or a judicial consent decree. Like other parties to the agreement, EPA should bind itself to undertake appropriate actions and follow agreed-upon schedules.
8. Negotiations undertaken in the context of litigation require procedures and standards different from the procedures and standards applicable to negotiations occurring before a matter reaches litigation. EPA should acknowledge that existing agency guidance memoranda on "case settlement policy" are appropriate for use only in litigation situations; to implement the proposed negotiation process, the agency should prepare new guidance memoranda that

bring more appropriate factors to bear on prelitigation negotiations.

9. The Conference recognizes EPA's need to maintain a strong litigation posture in CERCLA cases in order to strengthen its ability to negotiate agreements in the public interest. However, the Conference also urges the agency to consider the possible advantages of greater flexibility in situations where cleanup arrangements are being negotiated rather than litigated. For example, in some cases it might be desirable for EPA to begin to negotiate even if 80% of cleanup costs has not been offered or to agree with the parties about the amounts of their individual responsibilities to pay cleanup costs even if the total responsibility adds up to less than 100 percent of cleanup costs (allocating Superfund resources to pay for the rest), as an incentive for cooperating parties to join promptly in an agreement. The intransigence of a few responsible parties should not be permitted to block agreement with others prepared to accept reasonable shares of responsibility; moreover, such partial agreements may free agency resources to pursue the intransigent parties.
10. Although the Conference believes that its recommendation can be implemented without additional legislation, it acknowledges that the effectiveness of expanded reliance on negotiated cleanups would depend upon the degree of support or opposition from relevant congressional committees. If EPA undertakes efforts to clean up dump sites through a negotiation process like that described in this recommendation, congressional committees should support and encourage these efforts, recognizing that negotiated solutions inevitably involve compromises.
11. To promote achievement of its site cleanup management objectives, EPA should publish statements of its CERCLA policies, such as conditions for undertaking voluntary cleanup negotiations, procedures for public involvement in site cleanup decisions, and site study criteria, in the *Federal Register* and allow for public comment.

CONSULTANT RICHARD J. PIERCE, JR., (LOWER LEFT) AND WILLIAM C. BUSH (UPPER LEFT), LIAISON TO THE COMMITTEE ON REGULATION, PRESENT THE PREEMPTION PROJECT TO THE COUNCIL. COUNCIL MEMBERS (CLOCKWISE FROM MR. BUSH'S LEFT): EDITH D. HAKOLA, T. KENNETH CRIBB, JR., VICE CHAIRMAN MARK S. FOWLER, LINDA CHAVEZ, CHAIRMAN LOREN A. SMITH, DANIEL OLIVER, OTIS M. SMITH, AND WALTER GELLHORN.

Recommendation 84-5: Preemption of State Regulation by Federal Agencies *(Adopted December 6, 1984)*

States have the power to regulate many forms of conduct. Each state must have broad power to regulate in ways that it believes to be in the best interests of its citizens, subject to the limitations stated in the federal and state constitutions. The nature and magnitude of the problems that require regulatory action vary substantially among the states, and state governments are normally in a better position than the federal government to determine the types of regulations that will serve the interests of the states' citizens. States sometimes have an incentive, however, to impose regulations that advance state interests at the expense of other states' interests or of national interests.

Federal courts have applied the Commerce Clause to limit state power to affect national interests only in those few cases where the state action clearly discriminates against interstate commerce or protects in-state economic interests from out-of-state competition. Institutionally, however, courts are ill-suited to attempt to limit state power to harm national interests when state regulation furthers in-state interests of one type while it simultaneously frustrates a national interest of a different type.

Congress can limit state power to harm national interests by (i) expressing in a statute a congressional intent to occupy a field completely, (ii) explicitly preempting the specific type of state regulation at issue, or (iii) imposing a federal regulatory duty directly in conflict with a duty imposed by the state. The conflict, delay, and uncertainty of outcome that occur when preemption questions must be resolved by the judiciary can be avoided if Congress addresses preemption issues clearly and explicitly when enacting regulatory statutes. The congressional agenda is so crowded, however, that Congress cannot be expected to consider explicitly and in detail all of the forms of state regulation that may harm the national interest. Congress experiences particular difficulty anticipating and resolving directly the many arguable conflicts between the national interest and new state regulations issued in the aftermath of a federal decision to deregulate an area of conduct.

Because of the limited ability of Congress and the judiciary to act as checks on state regulation that harms the national interest, states possess, in practice, the power to make regulatory choices that produce net benefits within the state but that produce substantial net detriments on a national level. Without an additional federal constraint on state regulatory power, states can be expected to regulate in this manner frequently.

Federal agencies can play a valuable role in supplementing judicial and congressional constraints on state regulation. Courts regularly affirm federal agency actions that preempt state regulations when the preemptive effect of the federal action is no broader than can be justified by the evidence of need for preemption. Federal agencies sometimes consider preemption of a state law or regulation, however, without providing affected states notice and an opportunity to participate effectively in the agencies' proceedings.

A federal agency considering a regulatory action—whether to expand or reduce regulatory constraints—should be sensitive both to the

need to preempt state laws that seriously disrupt the federal program, and to the need to take into account the states' special needs and circumstances.

RECOMMENDATION

1. Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct.
2. Each federal agency should establish procedures to ensure consideration of the need to preempt state laws or regulations that harm federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency should clearly and explicitly address preemption issues in the course of regulatory decision-making. Particularly in the circumstances where a federal regulatory program is being reduced or eliminated (deregulation), an agency needs to be alert to the form and magnitude of state regulation that may exist—or may be quickly adopted to fill a perceived void left by the diminished federal regulation.
3. When a federal agency foresees the possibility of a conflict between a state law or regulation and federally protected interests within the federal agency's area of regulatory responsibility, the agency should, when practicable, engage in informal dialogue with state authorities in an effort to avoid such a conflict.
4. When a federal agency proposes to act through agency adjudication or rulemaking to preempt a state law or regulation, the agency should attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

Recommendation 84-6: Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings *(Adopted December 6, 1984)*

This recommendation concerns the protective orders practice of the United States International Trade Commission in antidumping and countervailing duty proceedings. Under the Trade Agreements Act of 1979, the Commission has authority to release to counsel, under protective order, certain confidential business and financial information that is submitted to it by parties in such proceedings.

The export to the United States of goods at less than their fair value (called "dumping") and the subsidization by foreign governments of exports of their countries' products to the United States are treated by American law as unfair methods of international trade. If dumped or subsidized imports are found to cause or threaten material injury to an industry in the United States, the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, provides for imposition of a duty in an amount intended to offset the margin of dumping or subsidy. There must be two determinations: (1) whether the imports in question have been dumped or subsidized, which is decided by the International Trade Administration of the Department of Commerce ("ITA"), and (2) whether the imports are causing or threatening injury to an industry in the United States, which is decided by the International Trade Commission ("ITC").

The injury proceeding at the ITC is substantially the same for both types of cases, known respectively as antidumping and countervailing duty proceedings. The ITC conducts a preliminary investigation in which it must determine within 45 days whether there is a "reasonable indication" that the injury test will be met. If its determination is negative, the entire antidumping or countervailing duty proceeding (including the portion conducted by the ITA) is terminated. If the ITC's determination is affirmative, and the ITA has made an affirmative determination that the imports are being dumped or subsidized, the ITC conducts a final investigation to reach a determination, which usually must be made within 120 days, whether the imports are threatening or causing injury to an industry in the United States.

In both stages of the proceeding, the ITC gathers extensive information from American producers, importers, and purchasers of the products in question. The Trade Agreements Act of 1979 authorizes the ITC to make available, under protective order, confidential business information that it has received in these proceedings. Under this authority, the ITC releases the confidential data of one party to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are those American companies that complain of injury from the alleged unfair import practices. Confidential data concerning their prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors. In addition, all confidential information submitted to the ITC, regardless of the submitter's identity, may ultimately be disclosed,

under judicial protective order, in proceedings to review ITC determinations before the Court of International Trade ("CIT").

Throughout its proceedings, the ITC devotes great care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations. Agency regulations provide procedures for requesting confidential treatment of proffered information, and the staff in practice accords confidential treatment without specific request to information acquired in response to questionnaires and other investigative inquiries. The record of each antidumping and countervailing duty injury proceeding is divided into public and nonpublic sections. Pleadings, staff documents, and ITC opinions are prepared and submitted under procedures designed to avoid the public disclosure of confidential information.

The principal concern here is not with the agency's internal procedures, but with the potential misuse of parties' information which has been received under protective order by lawyers for other parties. A particular concern is that such information will, wilfully or inadvertently, be passed along by a lawyer to his client, who then can make competitive use of it against the American company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs. It is believed that the perceived risk of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the International Trade Commission's ability to do its job. The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury"—not simply injury to individual American companies as such, but injury to the entire "industry" affected by competition from the imports. If American companies fear that their confidential business data will leak to their competitors, and for that reason refuse to submit such information, the Commission will be unable to assemble the complete industry figures it needs for a soundly-based determination of injury. Although the agency has the power to subpoena the necessary information, the short statutory deadlines it must meet and its own limited resources to procure enforcement of subpoenas make heavy reliance on voluntary cooperation a practical necessity.

Another area of concern arises from the circumstance that existing ITC practices do not adequately inform submitters of information of the high likelihood that confidential price and cost of production information will be disclosed, nor of the possibility that other confidential information may be disclosed, without further warning, in review proceedings before the CIT.

These recommendations propose that the ITC (and, in one case, the CIT) establish a series of measures intended to reduce the risks of disclosure, protect submitters and safeguard the process of making disclosure of price and cost of production data. In some circumstances, these measures would preclude disclosures that are now permitted. No recommendation is made to reduce the categories of information that are required by statute to be disclosed. Indeed, the ITC might appropriately consider some enlargement of the classes of information it will release under protective order to facilitate more meaningful analysis of the information now disclosed. Any broader disclosure should be ac-

companied by the safeguards herein recommended, and should be provided only if the Commission's investigative and decisional processes will clearly be improved thereby.

RECOMMENDATION

A. *Limiting the Exposure of Confidential Information*

1. The International Trade Commission should provide for the disclosure of confidential information during the preliminary investigation phase of its antidumping and countervailing duty injury proceedings only in circumstances in which disclosure is important to achieving the limited purposes of the preliminary investigation itself.
2. Confidential information submitted by a domestic producer party should not be disclosed to counsel for any other domestic party (except a United States importer which is an interested party within 19 U.S. Code § 1677(9)(A)).
3. The Commission by regulation or policy statement should define and specify the kinds of data which are disclosable as "information concerning the domestic price and cost of production of the like product."

B. *Protection Of Submitters' Interests*

1. The Commission's questionnaires should more clearly inform petitioners and supporters of the petition about the likelihood that their confidential price and cost of production information (whether submitted in response to the questionnaire or otherwise) will be disclosed by the Commission under protective order to counsel for competitors of the submitter.
2. The Commission's questionnaires and other inquiries, by which confidential information is requested from parties and nonparties, should be accompanied by a statement that all such information of whatever kind (not merely that in the price and cost of production categories) is subject to disclosure by the Court of International Trade, under protective order, to counsel for any party to a judicial review proceeding involving such information.
3. Although in practice the Commission does not require the submitters of responses to questionnaires and follow-up inquiries to make specific request that the information submitted be treated as confidential by the Commission, its regulations (19 C.F.R. § 201.6) do require such a specific request. The regulations should be modified to reflect the practice.
4. The Commission's regulations should be conformed to 19 U.S. Code § 1677f(b), which requires the Commission to treat as confidential any information so designated by the submitter, unless the Commission requests an explanation and is unpersuaded by it, in which event it must return the information to the submitter.
5. The Commission should establish by regulation an informal procedure whereunder the submitter may object to disclosure of its information under protective order, except in cases of extra-

ordinary urgency. Commission regulations should also provide that, when the submitter is given notice of an application for disclosure of its information, it also be advised specifically of the procedures whereunder it may object.

6. With respect to a requirement that the requester show a need for confidential information before it can be released under protective order, for the ordinary case the Commission should continue its present practice whereunder a simple statement of need, rather than a showing of need, suffices. Where extraordinary sensitivity or other unusual considerations are demonstrated by the submitter, the Commission should require an actual showing of substantial need before releasing the information. The Commission's regulation (19 C.F.R. § 207.7(a)), which purports to require the requester to "demonstrate . . . a substantial need for the information in the preparation of his case" in all instances, should be modified accordingly. In all cases the statement of need should be accompanied by a statement of the requester's intent to participate actively in the proceeding.
7. The Court of International Trade should seek to provide in proceedings for judicial review of ITC injury determinations in antidumping and countervailing duty cases, that nonparty submitters be given notice and a meaningful opportunity to object to the release under protective order of any confidential information which they had submitted to the International Trade Commission.

C. *Counsel's Responsibilities Under Protective Orders*

The Commission's regulations and protective orders should provide by specific language that the attorney who has received information under protective order may be personally liable to sanctions (1) for a breach of the protective order by other persons—such as attorneys, experts, and support staff working on the case—to whom the attorney, under the authority of the protective order, has divulged the confidential information or (2) where the attorney has been shown to have been negligent in the custody of such information and unauthorized disclosure has resulted.

D. *Possible Broader Disclosures*

1. Confidential price and cost of production information submitted to the Commission by importer and foreign parties to the investigation should be made available under protective order to counsel for domestic parties to the investigation, or at least to those who support the petition.
2. The Commission should consider disclosing under protective order further kinds of confidential information pertaining to price and cost of production, beyond what is now disclosed, to the extent such further information can facilitate more meaningful analysis of the kinds of information that are now disclosed.
3. The Conference takes no position on whether or not the Com-

mission should consider disclosing confidential information in categories other than price and cost of production. If the Commission does consider such disclosure, it should make such disclosure only (a) in categories where party analysis of such information is likely to assist the Commission's investigation without impeding its fulfillment of statutory deadlines, (b) in cases in which the requester shows a substantial need for access to the information, and (c) under additional safeguards including as appropriate those recommended herein.

Recommendation 84-7: Administrative Settlement of Tort and Other Monetary Claims Against the Government

(Adopted December 7, 1984)

In the Federal Tort Claims Act and dozens of other statutes,* Congress has authorized agencies to provide compensation for losses occasioned by a variety of agency actions. The FTCA, the centerpiece of this array, essentially waives the government's soverign immunity to damage actions arising out of the negligent or otherwise wrongful acts committed by federal employees while acting within the scope of their employment. Previously Congress had been burdened by numerous private bills to redress government torts. The FTCA sought initially to shift to the courts primary responsibility for determining whether redress was warranted. In 1966 the FTCA was amended to transfer much of that load to agencies. At that time, Congress required claimants to present claims to the responsible agency as a prerequisite to suit and gave the agency a minimum of six months in which to act upon them. The agencies were also given an unprecedented degree of settlement autonomy. The FTCA requires that the exercise of this authority be "in accordance with regulations prescribed by the Attorney General," but does not subject it to detailed procedural mandates apart from the requirement that the Department of Justice approve large settlements.

This relatively inconspicuous administrative process has taken on considerable significance in dealings between agencies and individual claimants, and could gain even more if Congress acts to displace suits against individual federal officials by an expansion of the government's liability under the FTCA.** Available information suggests that the administrative process resolves a high proportion of claims worth paying at the same time as it exposes the unmeritorious character of many of the thousands of claims filed annually. In both ways, it effectively replaces litigation with a largely informal, relatively open, and potentially nonadversarial means of dispute resolution.

Although the present system seems generally to be serving Congress' purposes, it has not been without difficulties. In particular, the extent to which administrative settlement should be taken as an autonomous dispute resolution process is unclear. In some agencies the claims officer approximates a neutral decision maker, objectively appraising something in the nature of an inchoate entitlement. Other agencies view their claims officers as adversaries of the claimant engaged in tactical maneuvers that are preludes to litigation or to bargaining for a financially advantageous settlement of sustainable claims.

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*"Meritorious claims" statutes allowing agencies to entertain some kinds of claims even where no fault can be shown, include the Military and Foreign Claims Acts and statutes covering certain actions of the Department of Agriculture and Justice, NASA, the NRC, the Peace Corps, and the Postal Service. Other ancillary statutes, like the Suits in Admiralty Act, Public Vessels Act, Copyright Infringement Act, Trading with the Enemy Act, and Swine Flu Immunization Act, complement the FTCA, for instance by addressing claims likely to be exempt from that Act.

**See *Recommendation 82-6: Federal Officials' Liability for Constitutional Violations.*

The Conference, though not recommending any radical restructuring of the agency claims process, believes that this ambiguity has sometimes produced undesirable results. Inappropriately adversarial responses to technical deficiencies, restrictive policies on information disclosure in connection with a pending claim, and less than fully fair and objective approaches to determining the merits and monetary value of a claim do not serve the purposes of the FTCA, nor do they enhance confidence in claims officers' determinations. Claimants, who may obtain a trial *de novo* beore a federal judge after a wait of only six months, are finding the judiciary to be increasingly sympathetic, perhaps in part because some of the judges doubt the fairness and efficiency of some of the agencies' claims handling. To further administrative effectiveness, the Conference recommends the following fine-tuning of the FTCA, of certain agency practices, and of the Department of Justice's regulations.

RECOMMENDATION

A. *Agency Exercise of Settlement Authority*

1. *Providing Guidance to Claimants*

   (a) Agency claims officers, as part of their duties, should take reasonable steps to save a claimant who has come forward with a potentially deserving claim from innocently failing to perfect a valid statutory demand, committing technical error, or running afoul of a statute of limitations. Among other things, claims officers should promptly advise claimants of formal deficiencies so as to give claimants an opportunity to cure them. Further, in the case of deficiencies relating solely to the requirements of the Attorney General's or agency's regulations, as opposed to jurisdictional requirements of the FTCA itself, the agency should consider extending the claimant an opportunity to cure such deficiencies for a reasonable time beyond the ordinary limitations period.

   (b) Each agency General Counsel's office should compile and publish in the CFR a list briefly describing statutes under which the agency is authorized to entertain monetary claims and the name and telephone number of the agency personnel in charge of each program. In appropriate circumstances, claims officers should make a copy of the list available to claimants.

2. *Filing the Claim*

   (a) The Attorney General should amend his regulations to treat an FTCA administrative claim as still timely though received after expiration of the statute of limitations, provided that the claimant can demonstrate that he or she sent it by an ordinarily effective means of delivery before expiration of that period.

   (b) Agencies should require claims officers to advise claimants that the absence of a sum certain for all categories of

claims may preclude their consideration by both agency and court, and that, subject to timely amendment and the existing statutory exceptions, the amount of the administrative claim constitutes a ceiling on the damages that may later be sought in court.

3. *Substantiation of Claims*
   Where exchanges with a claimant reveal an insufficiency of information submitted in support of the claim, agency claims officers should promptly and clearly advise the claimant whether the continued nonproduction of designated information will, in the officer's view, warrant dismissal of the claim as invalid because of incomplete documentation.
4. *Access to Information*
   Agencies should endeavor, particularly when a claimant seeks access to his or her claim file or to other information relating to a pending claim, to promote a mutually free and open exchange of relevant information. Agencies should consider release even when applicable statutes would not require it if more extensive disclosure might advance settlement. Specifically, agency claims officers should not routinely regard the information they assemble in connection with an administrative tort claim as falling within the government's executive privilege for deliberative materials, or the attorney-client, expert witness, or qualified attorney work product privileges, and in appropriate circumstances claims officers should be prepared to disclose information falling within those privileges.
5. *Claims Decisions*
   (a) Agencies should give a brief statement of the grounds for denial whenever an FTCA or other claim is rejected.
   (b) An agency claims officer's ultimate goal should be a fair and objective assessment of the merits of a claim and of its monetary worth. In addition, the Department of Justice should not exercise its statutory approval authority over large administrative settlements in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and objective settlement with a deserving claimant.
6. *Reconsideration*
   (a) Claim denial letters should inform claimants that they may request the agency's reconsideration of its denial, and that such a request extends the six month waiting period before suit may be filed in federal district court.
   (b) In cases where the claimant communicates with the claims officer following final denial, the officer should promptly indicate whether or not, in his or her view, the communication constitutes a request for reconsideration and state specifically the procedural implications of that determination.

B. *Statutory Changes*

1. Congress should conduct a comprehensive reexamination of the meritorious and other ancillary claims statutes in force to ensure that each is warranted and that, together, they form a coherent whole both on their own terms and in relation to the FTCA. Congress should systematically raise ceilings on all agency authority to settle claims where inflation has rendered obsolete the present levels.
2. Congress should amend 28 U.S. Code § 2401(b) to provide that, where a claim has been filed with the wrong agency in a timely manner and transferred to the appropriate agency, the original date of filing will be used for determining timeliness. To help ensure that agencies have an adequate and predictable length of time to investigate and consider claims, Congress should provide that the six-month period given the agencies for that purpose not commence until the claim has been received by the appropriate agency.
3. Congress should further amend 28 U.S. Code § 2401(b) to provide that, where an otherwise timely damage action against a person for whose tortious conduct Congress has made the federal government exclusively liable is converted into a suit against the government under the FTCA and then dismissed for failure to file a prior administrative claim, the plaintiff shall have 60 days from the date of such dismissal or two years from the date the claim arose, whichever is later, in which to file such a prior claim.

COMMITTEES

Conference members participate actively in the research activities of the Conference through the standing committees prescribed by the bylaws and through such additional special purpose committees as the Chairman, Council, or members find necessary to further the Conference's mandate. Six standing committees and one special purpose committee, were active during 1984.

Each standing committee works generally within the field of inquiry suggested by its title. Distinctions between committee responsibilities are intentionally fluid in order to permit the members wide latitude for inquiry. Since projects are often pertinent to the concerns of more than one committee, the Office of the Chairman coordinates the committees' activities to prevent conflict or duplication of effort.

COMMITTEE ON ADJUDICATION

In addition to matters relating to formal adjudication under the Administrative Procedure Act, this committee has a broad mandate to study and recommend fair and efficient procedures for agency activities that may affect private rights but do not involve formal, structured proceedings. These "informal" matters, which make up the great majority of all agency business, include exercise of prosecutorial discretion, negotiation and mitigation of civil penalties, handling of applications and complaints, and providing guidance for private parties on legal and policy matters. The committee also examines the distribution of responsibility within agencies, including internal delegations of authority and procedures for review of staff action; practices affecting the competence, effectiveness, and ethical standards of agency employees involved in administrative proceedings, and their potential civil liability; and problems concerning personnel selection, evaluation, compensation, and tenure.

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*Term of service ended during 1984.
**Served as chairman through June 1984; term of service as Public Member ended during 1984; appointed Special Counsel during 1984.

COMMITTEE PROJECTS IN 1984

Agency Experience under the Government in the Sunshine Act
Consultant: Professor David M. Welborn

On the basis of Professor David Welborn's report analyzing agency experience under the Government in the Sunshine Act, the Committee proposed a two-part recommendation which was considered and adopted as Recommendation 84-3 by the Assembly in June.

RICHARD J. LEIGHTON, CHAIRMAN OF THE COMMITTEE ON ADJUDICATION, SPEAKS ON AN ITEM AT THE TWENTY-NINTH PLENARY SESSION.

Performance Evaluation of Administrative Law Judges
Consultant: Professor Victor G. Rosenblum

Whether and how an agency can control the quantity and quality of an ALJ's decisional output is being examined, with particular attention to a current dispute at the Social Security Administration. Professor Rosenblum has submitted a report, and in November the committee considered—but failed to agree on—a recommendation. The committee is continuing its work in the whole range of issues involving the status and role of administrative law judges, including legislative proposals for establishing an ALJ corps.

State Administrative Law Judge Corps
Consultant: Malcolm C. Rich

Mr. Rich is studying performance evaluation procedures and overall cost-effectiveness of centralized state administrative law judge corps. It is expected that comparisons between central panel systems and states in which no central panel is used will provide useful lessons in evaluating proposals for a federal ALJ corps. A final report is expected early in 1985.

Split Enforcement Model of Agency Organization
Consultant: Professor George R. Johnson, Jr.

In the "split-enforcement model" one agency (e.g., OSHA) investigates and prosecutes regulatory violations before a wholly separate independent adjudicative agency (e.g., OSHRC). Professor Johnson will compare split enforcement experience with unitary enforcement (e.g., ICC) experience. A final report is expected in mid-1985.

Committee chairmen at the Twenty-eighth Plenary Session.

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COMMITTEE ON ADMINISTRATION

This committee deals with the procedures by which agencies operate programs of financial assistance, procurement, and property administration, including techniques for resolving disputes, methods of allocating benefits among applicants, and the effects of program administration on state and local entities.

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Alternative Dispute Resolution
Consultant: Philip J. Harter, Esq.

Mr. Harter is studying alternative procedures to help agencies reduce formality and delay in trial-type cases. He is examining the potential of mediation, arbitration, negotiation, mini-trials, and other processes intended to help agencies avoid much of the delay and rancor often present in adjudications. Mr. Harter will look at important legal and procedural questions arising out of agency use of these devices with the dual aims of helping agencies identify types of issues particularly amenable to less formal approaches, and of recommending procedures for resolving the issues expeditiously. Mr. Harter has begun background work, including interviews with personnel at agencies that have begun using some of these alternatives. He has selected several agencies for closer study, based on a questionnaire developed in conjunction with the Office of the Chairman. Case studies will include processes at the Commodity Futures Trading Commission, Environmental Protection Agency, Department of Health and Human Services, Federal Energy Regulatory Commission, and Merit Systems Protection Board. Mr. Harter met with the committee and submitted a status report in 1984. A final report is expected in 1985.

Settlement of Tort Claims
Consultant: Professor George A. Bermann

Agency processes for handling monetary claims, an area of administrative procedure where little research had previously been done, was the focus of Professor Bermann's study on claims under the Federal Tort Claims Act and other agency-specific "meritorious claims" statutes. Professor Bermann conducted detailed interviews at the Department of Justice and with claims officers at several other agencies regarding the agencies' processes and standards for judging and adjusting claims. Professor Bermann's final report in October 1984, a comprehensive study of agency claims-handling, provided the committee with a basis for drafting a proposal that was adopted as Recommendation 84-7 by the Assembly at the December plenary session.

Procedures for Implementing Block Grants
Consultant: Professor George D. Brown

The committee completed its work with Professor Brown on legal and procedural aspects of the block grant programs created by the Omnibus Budget and Reconciliation Act of 1981. While these grant programs are intended to give a degree of decisional authority to state and local governments greater than provided by most "categorical" programs, the statute ignores many significant procedural and other types of questions, leaving agencies and grantees with some uncertainty. In September 1983 Professor Brown submitted a draft report on emerging legal questions, including those raised by private enforcement litigation in the context of block grants. In 1984 Professor Brown, on the basis of

committee discussions and further research, concluded that the block grants, as then operating, did not pose the kinds of problems that would warrant Conference recommendations. As a result, the project was discontinued.

Procedural Questions Raised by the Debt Collection Act of 1982
Consultants: Jacqueline C. Leifer, Esq. and Professor Luize E. Zubrow

The Debt Collection Act of 1982 gave agencies authority to assess interest on debts owed to the government, use administrative offset processes, and avail themselves of the services of collection agencies and credit bureaus. This project is intended to survey major legal and procedural questions raised by the Act. Significant issues are: the kinds of procedural protections that should be provided agency employees, grant recipients, and others before offsets can be made; the point at which interest should begin to accrue during an administrative appeal; the extent of agencies' non-statutory—i.e., common law—rights to assess interest and make offsets; and the manner in which offsets involving more than one agency should be handled. Ms. Leifer prepared a report on major issues raised by the Act, furnishing the basis for the committee to map future research plans. In September 1984 Professor Zubrow contracted with the Conference to examine in detail several of these issues and other questions of agency debt collection. Her report is expected in the summer of 1985.

Agency Use of Declaratory Orders under the APA
Consultant: Professor Burnele V. Powell

The Administrative Procedure Act authorizes an agency, "in its sound discretion," to issue a declaratory order "to terminate a controversy or remove uncertainty" (5 U.S. Code § 554(e)). The administrative declaratory order was intended by the APA's drafters to supplement informal agency advice-giving by providing a method for private parties to secure a binding, judicially reviewable declaration of rights and thus avoid penalties and other uncertainties. However, federal agencies have been reluctant to utilize this tool. Professor Powell has undertaken to assess the role of the declaratory order in agencies' advice-giving operations. His initial report, received in late 1984, discusses relevant case law at great length. Professor Powell calls for agencies to adopt rules that would explain their declaratory order policies. The rules also would set forth procedures by which a member of the public could obtain an agency adjudicatory determination under section 554(e)'s declaratory order provision. The committee will begin consideration of Professor Powell's draft recommendation early in 1985.

Unified Theory of Compensation for Governmental Wrongs
Consultant: Professor Ronald A. Cass

Compensation for victims of governmental wrongs may be denied when the government is "immune", or if the harm is "de minimus". Professor Cass will strive to develop a unified theory that takes into account the discretionary function exemption of the Federal Tort Claims Act as well as official immunity from liability for constitutional deprivations. A report is due late in 1985.

COMMITTEE ON GOVERNMENTAL PROCESSES

This committee examines the wide range of techniques used by agencies in carrying out federal programs. The committee is concerned with problems in the structuring and management of institutional decisionmaking, including methods for developing, refining, and evaluating relevant information, and eliminating sources of delay in administrative proceedings.

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*Term of service ended during 1984.
**Also served as public member during 1984.
***Transferred to Committee on Regulation during 1984.

Federal Agency Inspections for Regulatory Violations
Consultant: Professor Jack M. Kress

This study addressed procedural implications of court decisions subjecting some agencies to a warrant requirement prior to undertaking administrative inspections. Professor Kress also examined the use of aerial surveillance techniques and the use of private contractors to perform inspections. On the advice of the consultant, the committee decided that formal recommendations on inspections are unnecessary at the present time. However, the committee agreed that Professor Kress' report contains useful information and guidance to agencies that conduct inspections, and the report will be published in the Conference's 1984 volume of Reports and Recommendations.

Procedures for Product Recalls
Consultant: Professor Teresa M. Schwartz

Professor Schwartz, in collaboration with Robert S. Adler, Esq., studied the use of product recalls as a regulatory or enforcement technique. The report focused on recall programs at three agencies: National Highway Traffic Safety Administration, Food and Drug Administration, and Consumer Product Safety Commission. At its June plenary session, the Conference adopted Recommendation 84-2, based in part on the research of Professor Schwartz and Mr. Adler. The recommendation suggests several measures designed to streamline the process of obtaining recalls where recall is an appropriate remedy.

Citizen Suits under Federal Environmental Laws
Consultant: Professor Barry B. Boyer

Professor Boyer, working with Professor Errol Meidinger, is studying the phenomenon of privately initiated lawsuits to enforce environmental regulatory statutes. The major citizen suit statutory provisions are found in the Clean Air Act and the Clean Water Act, both enacted in the 1970's. These statutes provide for suits to obtain a penalty or an injunction against an alleged polluter, and for suits against the Environmental Protection Agency for failure to perform some nondiscretionary duty. The number of citizen suits has been increasing substantially in the last few years. The consultant's report, due early in 1985, will examine the use of the provisions and their impact on the agency's programs.

Permit Issuance Procedures at EPA
Consultant: Professor Scott C. Whitney

Professor Whitney will engage in a comprehensive review of the permitting processes associated with various environmental statutes. Of particular interest are "consolidated permit regulations", "public hearings", "adjudicatory hearings", and appeals to the administrator. A report is due in mid-1985.

COMMITTEE ON JUDICIAL REVIEW

The responsibility of this committee is to examine provisions concerning judicial review of administrative action, and those aspects of administrative procedure that have particular effects on the availability or effectiveness of judicial review.

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**Also served as a Liaison Representative during 1984.

Confidential Information in International Trade Cases
Consultant: Professor Robert A. Anthony

Section 777 of the Trade Agreements Act of 1979 spells out procedures by which the U.S. International Trade Commission may disclose confidential information obtained in an investigation of import practices to other parties under a protective order. Professor Anthony studied these procedures to determine whether this protection is sufficient, and whether potential disclosure discourages the voluntary submission of information to the Commission. His report, co-authored by Professor James Byrne and submitted in the fall of 1984, led to the adoption of Recommendation 84-6, which suggests ways to limit the exposure of confidential information and protect the interests of submitters.

Negotiating Voluntary Cleanups under Superfund
Consultant: Professor Frederick R. Anderson, Jr.

In an extensive study, Professor Anderson undertook to review the administrative and procedural issues associated with the Environmental Protection Agency's administration of the "Superfund" program. Professor Anderson's report analyzed the legislation and EPA's enforcement strategy, and proposed a more acceptable negotiated voluntary cleanup process. Recommendation 84-4 is based on this study.

Re-examination of the Scope of Judicial Review of Agency Actions
Consultant: Professor Christopher Osakwe

Professor Osakwe, an expert in comparative law, was asked to take a fresh look at the case law relating to the scope of judicial review of agency action and the meaning of the formulas listed in section 706 of the Administrative Procedure Act. He submitted a draft report in December 1983. No further action is contemplated at this time, although the committee may resume consideration of this general subject in a different format in 1985.

COMMITTEE ON REGULATION

This committee is concerned with procedural problems associated with the administrative control of private economic activity. It examines techniques for assessing regulatory costs and benefits, procedural aspects of deregulation, and methods for resolving conflicts between economic, safety, environmental, and other values. The primary assignments of this committee are to identify opportunities for increased efficiency and fairness through collaborative efforts by agencies with overlapping or related missions; to work for removal of statutory, procedural, and other barriers to such coordination; and, in particular, to propose procedures for eliminating duplication of effort and inconsistencies in regulatory requirements.

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Development of a Framework for Identifying and Coordinating Alternatives to Regulation
Consultant: Philip J. Harter, Esq.

Mr. Harter, assisted by economist George C. Eads, developed a framework to coordinate various alternatives to federal regulation, including voluntary standards, product liability law, insurance, state-imposed product standards, and product recalls. A final report was submitted in July, and the committee decided not to pursue the project further.

Non-lawyer Representation of Participants in Agency Proceedings
Consultant: Professor Jonathan Rose

Few agencies' rules of practice address the issue of whether non-attorney experts can act in a representational role during agency proceedings. Professor Rose, in his final report submitted early in 1984, analyzed the results of interviews and agency questionnaires circulated in 1983, and concluded that an increase in the role of non-lawyers should be encouraged. Professor Rose's study was limited to representation by experts in regulatory fields. At the close of 1984, the Committee was seeking a consultant to examine the role of non-lawyers in "mass justice" settings such as disability claims.

Federal Preemption of State Regulation
Consultant: Dean Richard J. Pierce, Jr.

Several industries have attempted to obtain relief from uneven state regulation by seeking preemptive federal regulation. Dean Pierce's study explored the standards and considerations appropriate for preemption decisions. At the committee's urging, the Conference adopted Recommendation 84-5, dealing with preemption practices both of Congress and of the agencies.

Siting of Large Scale Energy Development Projects
Consultant: Professor Gregory L. Ogden

The approval of large-scale energy development projects—pipeline terminals, oil refineries, nuclear power plants, synthetic fuel plants, etc.—typically involves complex and overlapping regulatory issues and jurisdictions. Professor Ogden investigated both voluntary and mandatory processes used throughout the nation. Based on Professor Ogden's report, the Committee proposed, and the Conference adopted, Recommendation 84-1, which is addressed to all levels of government that may be involved in siting industrial projects.

Regulatory Budget
Consultant: Dean Thomas D. Morgan

Proposals have been made to control the economic impact of federal regulatory programs by having Congress, on a yearly basis, enact a ceil-

ing on the costs that regulatory agencies could impose on the economy during the upcoming fiscal year. Dean Morgan will analyze the implications of these proposals, particularly in the light of steps taken by the President—in Executive Orders 12,291 and 12,498—to impose a greater degree of economic discipline on the regulatory activities of executive agencies. Dean Morgan's draft report is expected late in 1985.

Division of Roles in Joint Federal/State Regulatory Programs
Consultant: Professor Colin Diver

Several statutes create federal agency responsibility while permitting the states to operate their own programs if the programs are approved by the responsible federal agency as "effective". Professor Diver will examine (i) the processes by which federal agencies certify and decertify a state plan's effectiveness, (ii) the procedures required when a state seeks changes in its plan, (iii) how well federal monitoring works, and (iv) the grievance procedures appropriate when someone questions the adequacy of a state's performance. An initial report is expected late in 1985.

BETTY JO CHRISTIAN, CHAIRMAN OF THE COMMITTEE ON REGULATION, PRESENTS THE PREEMPTION PROJECT AT THE TWENTY-NINTH PLENARY SESSION.

COMMITTEE ON RULEMAKING

This committee considers the form and adequacy of procedures employed by agencies in issuing rules and regulations, with particular emphasis on the advantages and disadvantages of various procedural concepts and innovations, and on methods by which the views of affected individuals, businesses, and other interested persons can be effectively presented and considered in the rulemaking process.

Chairman
CALVIN J. COLLIER

Vice Chairman
ROGER V. BARTH
BEVIS LONGSTRETH*

Public Members
DAVID DAVENPORT
THOMAS F. ELLIS*
DANIEL F. EVANS, JR.
PAUL D. KAMENAR
JAMES S. MUNN
EDGAR H. TWINE*

Government Members
JAMES K. ASSELSTINE
JOHN H. CARLEY
BRUCE E. FEIN*
IRVING P. MARGULIES
BARBARA E. MCCONNELL*
J. E. MURDOCK III
JAMES R. RICHARDS
JACK D. SMITH

Council Members
LINDA CHAVEZ
MARK S. FOWLER
EDWARD C. SCHMULTS*

Liaison Representatives
J. C. ARGETSINGER
MARK C. CRAMER
NAHUM LITT
EDWARD D. RE
WILLIAM R. ROBIE
JANET D. STEIGER
DELPHENE C. STRICKLAND*

Senior Fellows
KENNETH CULP DAVIS
CORNELIUS B. KENNEDY
PHILIP A. LOOMIS, JR.*

Staff Liaison
MICHAEL W. BOWERS

*Term of service ended during 1984.

Agency Implementation of the "Regulatory Analysis" Requirement in Rulemaking
Consultant: Professor Thomas O. McGarity

Federal agencies have been conducting regulatory analyses under executive orders for the past several years. Regulatory reform legislation considered by Congress in 1984 would have made this a statutory requirement for all major rules. Although there is widespread consensus that such analyses can be useful, this study will undertake to see how agencies have been integrating this requirement into their rulemaking processes, and what needs to be changed. Professor McGarity met with the committee during 1984 to discuss his preliminary research findings. A final report and proposed recommendations are expected early in 1985.

Immigration Adjudication Procedures
Consultant: Dean Paul R. Verkuil

As an exception to its usual focus on rulemaking issues, the committee considered a report submitted by Dean Verkuil on the procedures used in various types of immigration adjudications by the Immigration and Naturalization Service. The study addressed the subject by following the format used in Dean Verkuil's earlier report to the Conference on informal adjudication procedures.

The committee proposed a recommendation based on Dean Verkuil's report and other information obtained during its deliberations. The recommendation addressed notice before exclusion hearings, review of long-term detention, and the role of Department of State advisory opinions in asylum adjudications. The Assembly debated the proposed recommendation at its June plenary session but declined to adopt a recommendation on those limited subjects. Instead, the Assembly returned the matter to the committee for additional research in the immigration area. The Conference intends to expand its investigation in 1985 into a wide-ranging review of several immigration-related topics.

SPECIAL COMMITTEE ON UNIFORM FEDERAL AGENCY RULES OF PROCEDURE

Chairman
JEAN F. GREENE, *Environmental Protection Agency*

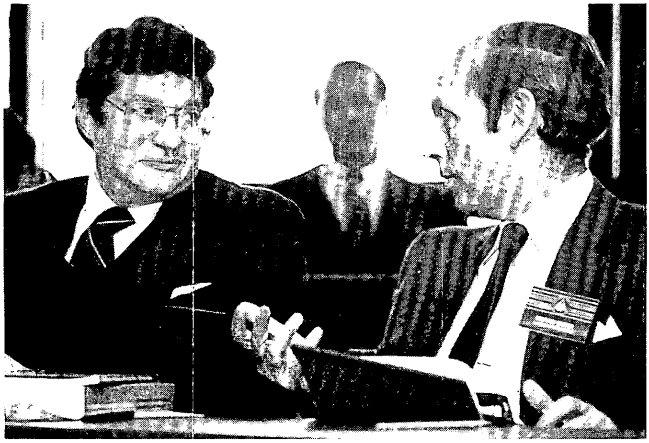
Members:
C. JONATHAN BENNER, *Federal Maritime Commission**
JOHN H. CARLEY, *Federal Trade Commission*
NEIL R. EISNER, *Department of Transportation*
RONALD E. ROBERTSON, *Public Member*
T. TIMOTHY RYAN, JR., *Public Member*
JAMES E. WESNER, *Senior Fellow*

Staff Liaison
JEFFREY S. LUBBERS

The Conference established this special committee to study the feasibility and practicality of developing uniform federal agency rules of procedure. The committee's focal point has been a set of rules (48 Fed. Reg. 32,539) developed by the Department of Labor for hearings before its administrative law judges. These rules, developed after extensive consideration of other agencies' rules, now cover proceedings under more than 60 disparate statutes administered by the Department of Labor. The committee solicited comments from agencies that conduct formal adjudications, asking the agencies to examine the Labor rules to see whether, or to what extent, those rules would be usable in the agencies' proceedings. These agencies were asked to comment on each of the 59 subparts of the rules. The committee met several times during 1984 to discuss proposed model rules drafted by committee members. The committee's goal is to draft a complete model set of rules for agency proceedings.

*Term of service ended in 1984.

Participants at the Twenty-ninth Plenary Session.



◀ NAHUM LITT
STEPHEN BREYER

JEAN F. GREENE ▶

◀ WILLIAM T. QUILLEN
PHILIP D. SAXON

OFFICE OF THE CHAIRMAN

BUDGET AND STAFF

The Conference's authorized budget levels are $2,300,000 per year for fiscal years 1984 through 1986. Appropriations during this period have remained well below the authorized ceilings. The Conference's budget for fiscal year 1984 was $1,123,000. For fiscal year 1985, the Conference was given $1,468,000 in a continuing resolution enacted in the fall of 1984, and had pending at the end of 1984 a supplemental request for an additional $12,000 for fiscal year 1985.

The staff of the Office of the Chairman during the year consisted of 23 persons, of whom 16 were full-time permanent employees. As in recent years, the Conference has conducted most of its research by using the services of outside academic or professional consultants.

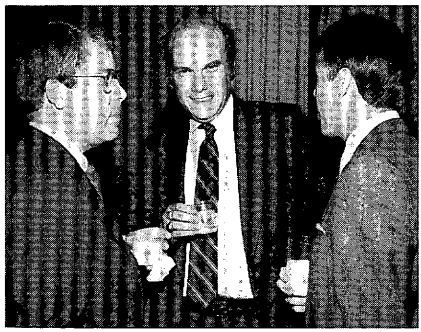
The Office of Management and Budget has recommended a slight decrease in funding for the Conference for fiscal year 1986, to a level of $1,450,000. Congress will be receiving and acting on this request in the spring and summer of 1985.

SENATOR ALAN K. SIMPSON (LEFT) DISCUSSES IMMIGRATION LAW REFORM WITH CHAIRMAN LOREN A. SMITH AT THE TWENTY-NINTH PLENARY SESSION.

Members and guests at the Reception for the Twenty-eighth Plenary Session.

◀ EDWIN MEESE III
LOREN A. SMITH
LEAANNE BERNSTEIN
ROBERT MCCARTHY, CHAIRMAN, LEGAL SERVICES CORPORATION

ADMINISTRATIVE LAW JUDGES
IRVING SOMMER (OSHRC)
DELPHENE C. STRICKLAND (FLORIDA)
NAHUM LITT (LABOR) ▶



DONALD PEARLMAN, EXECUTIVE ASSISTANT TO THE SECRETARY OF ENERGY
◀ ROBERT HORN, ESQ., HUSBAND OF GOVERNMENT MEMBER MARIAN BLANK HORN
WILLIAM H. SATTERFIELD

EDWIN MEESE III
JONATHAN C. ROSE
SUSAN PORTER ROSE ▶

JOSEPH A. MORRIS
◀ DEBORAH OWENS
LOREN A. SMITH

DOROTHY DELLINGER
ROYAL S. DELLINGER, DEPUTY EXECUTIVE DIRECTOR, PENSION BENEFIT GUARANTEE CORPORATION
ARTHUR J. DELLINGER, SR., DEPUTY INSPECTOR GENERAL, DEPARTMENT OF ENERGY

MRS. CHARLES D. ABLARD
LOREN A. SMITH
CATHERINE SMITH

M. PETER MCPHERSON, ADMINISTRATOR, AID
RICHARD K. WILLARD, ACTING ASSISTANT ATTORNEY GENERAL

WILLIAM A. BUTLER
EDWIN MEESE III

WILLIAM BRADFORD REYNOLDS
CLARENCE M. PENDLETON, JR., CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS

IMPLEMENTATION OF RECOMMENDATIONS

Securing implementation of the recommendations adopted by the Assembly is one of the most important regular functions of the Office of the Chairman. The Administrative Conference Act confers on the Chairman not only the authority but also the responsibility for encouraging federal agencies to carry out the recommendations of the Conference. While the Chairman has no statutory authority to compel the adoption of Conference recommendations, the Chairman and his staff are in a position to exercise considerable influence through persuasion and marshalling of opinion.

Regulatory Negotiation

Recommendation 82-4 urges agencies to consider using regulatory negotiation to draft proposed rules in carefully selected instances. The Conference suggested that representatives of affected interests might be able to work together to negotiate rules that would be acceptable to the various interests as well as to the agency. During 1984 three federal agencies made serious attempts to apply the procedures proposed by the Conference in Recommendation 82-4.

The Federal Aviation Administration, in 1983, established an advisory committee for the purpose of negotiating a proposed rule on flight and duty time requirements for flight crew members. Early in 1984, the committee members were able to agree to recommend that FAA issue a notice of proposed rulemaking. Although there was some disagreement on the contents of the proposed rule, it was published for comment in March 1984. The committee met again in September, and a final recommendation was subsequently submitted to the FAA. At the end of the year, the matter was still pending before the agency.

The Environmental Protection Agency has been successful at having a negotiating committee reach a consensus on a proposed rule concerning nonconformance penalties for motor vehicle manufacturers under section 206(g) of the Clear Air Act. Progress toward consensus on a proposed rule has also been reported in the area of pesticide emergency exemptions under section 18 of the Federal Insecticide, Fungicide and Rodenticide Act. Like the FAA, the EPA has, in general, followed the procedures recommended by the Administrative Conference.

The Occupational Safety and Health Administration attempted to use regulatory negotiation to formulate a rule governing occupational exposure to benzene. This effort has not been successful.

The Office of the Chairman has assisted each of these agencies in its efforts to use the advantages of negotiation in rulemaking. In addition, comments were submitted on proposed legislation (S. 1823 in the 98th Congress) that would facilitate agency use of regulatory negotiation. In adopting Recommendation 82-4, the Conference noted the experimental nature of the suggested procedures, and indicated an intent to review regulatory negotiation after agencies had tried using the technique. The Office of the Chairman recently contracted with Professor Henry H. Perritt, Jr., to study the experience of FAA, EPA, and OSHA in negotiating rules.

Freedom of Information Act

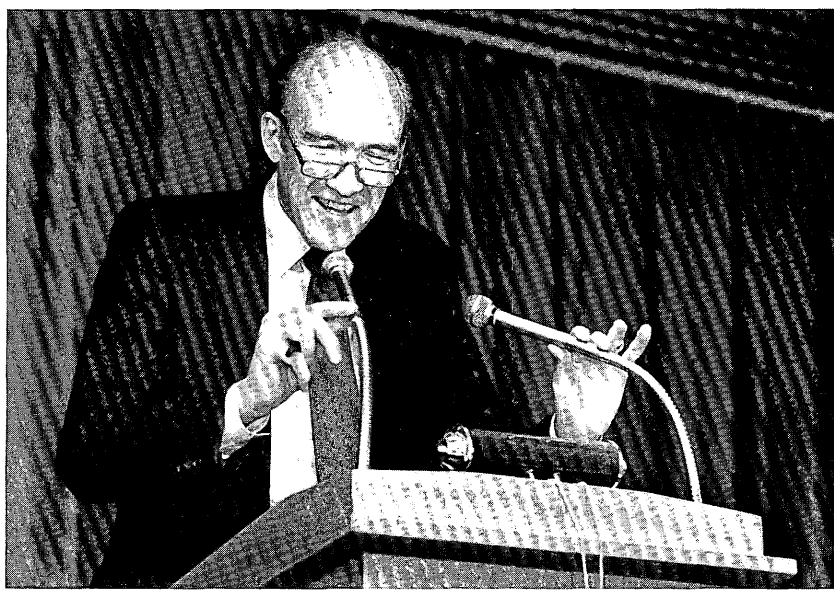
Several pieces of legislation in recent Congresses would have substantially implemented *Recommendation 82-1: Exemption (b)(4) of the Freedom of Information Act* and *Recommendation 81-1: Procedures for Assessing and Collecting Freedom of Information Act Fees.* Senate bill S. 1730 in the 97th Congress died after approval by the Senate Judiciary Committee. In the 98th Congress, S. 774 died in the House after Senate approval. Chairman Smith testified in favor of S. 774. Senate bill S. 150, introduced in the 99th Congress by Senator Hatch, would, if enacted, fully implement the portions of these recommendations requiring legislation. Recommendation 82-1 calls for agencies to adopt procedures that will protect the interests of submitters of information, when that information becomes the object of a FOIA request. Most agencies have subsequently adopted conforming procedures, and the Department of Justice has issued guidance to all agencies that would, if followed, implement as much of Recommendation 82-1 as the agencies are capable of doing without legislation.

Confidential Trade Information

Recommendation 84-6: Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings addresses measures to protect the confidentiality of information submitted in ITC cases. The ITC gave serious consideration to the proposal during the period of time that the Committee on Judicial Review was studying the subject. The ITC received drafts of the consultant's report, participated in committee meetings, and reviewed the recommendation in the proposal stage. The Commission sent to the Twenty-ninth Plenary Session a message to the effect that certain of the suggestions made in the recommendation as then drafted were already under consideration, and serious consideration would be given to the remainder in the near future.

Race to the Courthouse

Recommendation 80-5: Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action has been the focus of a major implementation effort. A provision embodying the recommendation was included in omnibus regulatory reform legislation in 1983, and Chairman Smith testified on it before the Senate Judiciary Committee in the 98th Congress. When it appeared as if the legislation would die, ACUS staff actively encouraged interested Congress members to break out the race-to-the-courthouse provision and proceed separately with it, and this was done. Chairman Smith testified on this separate legislation in 1984. The Chairman and staff provided extensive technical assistance, and spoke to and met with various members of Congress and their staffs in an attempt to resolve concerns about the legislation, which did not reach a vote before the end of the last session of the 98th Congress. However, an identical proposal is expected to be reintroduced in the 99th Congress, and the Office of the Chairman will continue to push very actively for this legislation.



SENATOR ALAN K. SIMPSON DESCRIBES THE DIFFICULTIES IN ENACTING IMMIGRATION LAW REFORM LEGISLATION AT THE TWENTY-NINTH PLENARY SESSION.

ADVICE AND ASSISTANCE ON LEGISLATION

Chairman Smith testified on behalf of the Conference on a variety of legislative proposals in 1984.

Legislative Testimony in 1984

February 8	Amendment to S. 1080, Regulatory Reform Act, respecting use of joint resolutions to approve or disapprove agency rules. Senate Judiciary Committee.
March 1	H.R. 3688, Contract Disputes Improvement Act. House Judiciary Committee.
March 2	S.J. Res. 135, constitutional amendment to authorize a legislative veto. Senate Judiciary Committee.
August 9	S. 774, Freedom of Information Reform Act. House Government Operations Committee.

In addition, the staff of the Chairman's Office worked with Congressional staff and other interested persons to develop a generally acceptable text of a bill to eliminate the "race to the courthouse." As a result a clean bill, H.R. 5365, was favorably reported by the House Judiciary Committee and passed by the House on June 18. The bill failed to reach the floor of the Senate in the closing days of the session.

The Office also provided oral and written comments to Congress and the Office of Management and Budget on the procedural aspects of proposed legislation.

CLEARINGHOUSE ACTIVITIES

One of the statutory missions of the Administrative Conference is to arrange among administrative agencies for interchange of information potentially useful in improving administrative procedure. During the year Chairman Smith oversaw the continued activities of both the Council of Independent Regulatory Agencies, established by the President in 1982, and the interagency organization, the Agency Management Information Group, created in 1983. Chairman Smith was active during the year as a member of two of the President's Cabinet Councils: the Cabinet Council on Legal Policy, and the Cabinet Council on Management and Administration. The Office of the Chairman has held a series of regulatory colloquia for government officials. The Office also continued to perform its reporting and consultative duties under the Equal Access to Justice Act.

CHAIRMAN LOREN A. SMITH CONDUCTS A MEETING OF THE AMIG FEDERAL CORPORATIONS COMMITTEE AT THE PENSION BENEFIT GUARANTEE CORPORATION.

CIRA

The Council of Independent Regulatory Agencies (CIRA) is an informal organization composed of the chairmen of the fourteen major independent regulatory boards and commissions. At its monthly meetings agency chairman exchange ideas concerning governmental and regulatory issues and problems, and discuss issues with key members of the executive branch, academics, senators and congressmen, former agency chairmen, and other prominent persons. The first CIRA meeting was held at the White House on April 16, 1982, with President Reagan. At the end of 1984 agency chairmen comprising the membership of this organization are:

LOREN A. SMITH, *Chairman*	Administrative Conference
DAN MCKINNON	Civil Aeronautics Board
SUSAN MEREDITH PHILLIPS	Commodity Futures Trading Commission
NANCY HARVEY STEORTS	Consumer Product Safety Commission
CLARENCE THOMAS	Equal Employment Opportunity Commission
MARK S. FOWLER	Federal Communications Commission
RAYMOND J. O'CONNOR	Federal Energy Regulatory Commission
EDWIN J. GRAY	Federal Home Loan Bank Board
ALAN F. GREEN, JR.	Federal Maritime Commission
PAUL A. VOLCKER	Federal Reserve System
JAMES C. MILLER III	Federal Trade Commission
REESE H. TAYLOR, JR.	Interstate Commerce Commission
DONALD L. DOTSON	National Labor Relations Board
NUNZIO J. PALLADINO, JR.	Nuclear Regulatory Commission
JOHN S. R. SHAD	Securities and Exchange Commission

During the year, CIRA meetings—held on an average of once monthly—alternated between informal breakfast meetings at the White House and meetings featuring a particular subject, the latter usually also featuring a guest speaker. Speakers during the year included Counsellor to the President Edwin Meese III and Merit Systems Protection Board Special Counsel K. William O'Connor. Executive Director Stephen L. Babcock serves as secretary to this group.

Cabinet Council Membership

During the year Chairman Smith continued his activities as a member of two of the President's Cabinet Councils: the Cabinet Council on Legal Policy and the Cabinet Council on Management and Administration.

The Cabinet Council on Legal Policy, headed by the President and chaired pro-tem by Attorney General William French Smith, is the focal point for decisions on legal questions of government-wide importance. In addition to the President, the Attorney General, and Conference Chairman Loren A. Smith, membership in this Cabinet Council includes the Vice President; the Secretaries of Commerce, Interior, Labor, State, Transportation, and Treasury; the Counsellor to the President; and the Director of the Office of Management and Budget.

The Cabinet Council on Management and Administration, also headed by the President, is chaired pro-tem by Counsellor to the President Edwin Meese III. Its other members are the Vice President; the Secretaries of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Transportation, and Treasury; the Administrators of the General Services Administration and Veterans Administration; the Directors of the Office of Management and Budget and the Office of Personnel Management; and the Chairman of the Administrative Conference. The Cabinet Council on Management and Administration deals with government-wide questions involving personnel, space utilization, financial management, governmental organization and structure, and other general management issues. Executive Director Babcock is a member of the Council's Executive Secretariat, which meets two to three times each month to discuss matters to be placed on the Council's agenda.

In the fall of 1983 Chairman Smith was asked to head a task team—composed of staff from member departments and agencies of the Cabinet Council on Management and Administration—to review systems in place in the various departments and agencies to control the use of consultant services. In February 1984 this group, whose day-to-day affairs were led by Executive Director Babcock, completed its work and delivered a report to Deputy Commerce Secretary Clarence J. Brown. The matter was subsequently discussed before the Cabinet Council.

AMIG

In connection with his membership in the Cabinet Council on Management and Administration, Chairman Smith established in 1983 another interagency organization called the Agency Management Information Group. In part, this action was in response to the fact that, while the cabinet departments and central management agencies can participate in Presidential management initiatives through the Cabinet Council, there was no organized way in which the other 60-odd executive branch entities, most of them much smaller than the cabinet departments, could play a part in these activities. In addition, Chairman Smith hoped that AMIG would provide a forum for the exchange of information on management problems and issues among the member agencies. Since a group of this large size cannot easily act as a planning unit, a steering committee—consisting of the heads or principal management officers of a representative group of agencies of differing types and sizes—was created. At year's end, the steering committee's members were, in addition to the Conference, the following agencies: the Advisory Commission on Intergovernmental Relations, the Agency for International Development, the Equal Employment Opportunity Commission, the Federal Energy Regulatory Commission, the Federal Mediation and Conciliation Service, the Merit Systems Protection Board, the National Aeronautics and Space Administration, the National Transportation Safety Board, the Pension Benefit Guaranty Corporation, the Postal Rate Commission, the Selective Service System, and the United States Information Agency. A number of more specialized committees also have been organized. During the year, the Government Corporations Committee, chaired by Pension Benefit Guaranty Corporation Executive Director Charles C. Tharp, and the Small Agencies Committee, chaired by Administrative Conference Executive Director Stephen L. Babcock, were especially active.

Speakers at AMIG meetings during the year included Office of Personnel Management Director Donald Devine, Office of Management and Budget Associate Director Arlene Triplett, and officials from the General Services Administration involved in the Administration's space planning initiative.

Regulatory Colloqiuia

In 1982 the Office of the Chairman began sponsoring an interagency "Colloquium on Regulatory Design in Theory and Practice" in which knowledgeable speakers share their ideas on regulatory reform with lawyers, economists, and policy analysts from a wide variety of federal agencies. The series is coordinated by Conference consultant Dr. Harold I. Sharlin, and is supported by financial contributions from the Food Safety and Inspection Service of the Department of Agriculture, the Environmental Protection Agency, the Federal Trade Commission, the Federal Reserve Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Administration, the Postal Rate Commission, and the Departments of Health and Human Services and Transportation.

Speakers and their topics at sessions held in 1984 were:

JANET POTTS, Assistant General Counsel, Subcommittee on Administrative Law and Government Relations, House Judiciary Committee, and ROBERT LITAN, Powell, Goldstein, Frazer and Murphy—*The Regulatory Process: OMB or Not to Be*

CHARLES A. MARVIN, Department of Justice, Canada—*Regulatory Reform Canadian Style*

DR. PAUL SLOVIC, Decision Research—*Risk Perception and Risk Regulation*

BROCK EVANS, National Audubon Society—*Taking a Chance on Risk: The Public Interest Organization's View*

NELSON J. COONEY, American Trucking Association, and MARTIN CONNOR, General Electric Corporation—*Preemption: The Government By Our Side or On Our Backs?*

JUDGE ABNER J. MIKVA, U.S. Court of Appeals—*The Rise and Fall of (and Soon to Rise Again) the Legislative Veto*

RAYMOND F. BURKE, NYNEX Corporation, and JOHN D. LANDERS, AT&T Communications of Virginia, Washington, D.C., and Maryland—*More Innovative Technology Through Less Regulation: The Communications Industry*

CHRISTOPHER C. DEMUTH, formerly Administrator, Office of Information and Regulatory Affairs, OMB—*Insights into OMB Agency Oversight*

JODY POWELL, formerly press secretary for President Carter—*What Does the Press Have Against the Professionals in Washington?*

ROBERT M. BERNERO, Nuclear Regulatory Commission—*Risk Analysis for Decision Makers*

MICHAEL S. BARAM, Boston University, and DR. JOSEPH FIKSEL, Arthur D. Little, Inc.—*Principles for Use of De Minimis Concepts in Risk Regulation*

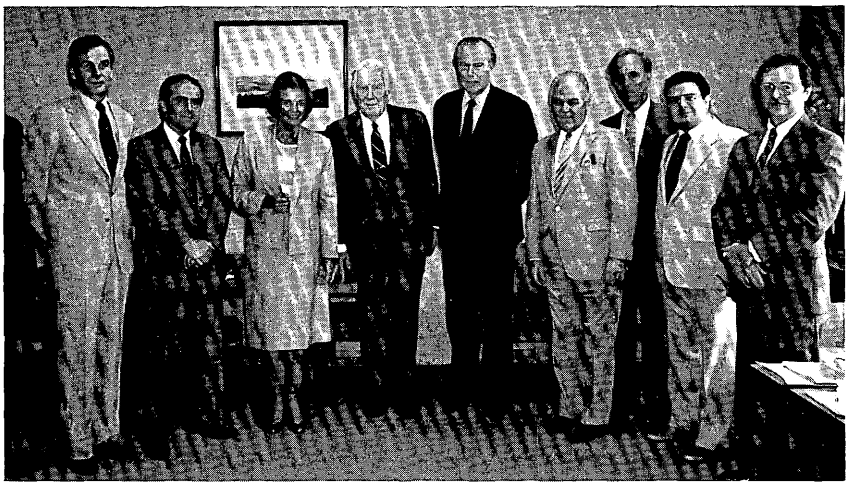
Equal Access to Justice Act

The Equal Access to Justice Act provides for the award of attorneys' fees and expenses to certain parties who prevail over the federal government in administrative and court proceedings. The EAJA assigned to the Office of the Chairman important consultative and reporting responsibilities. In 1984 the Office collected and analyzed data on fee awards in administrative proceedings, and provided advice and assistance as requested by congressional and agency personnel and members of the public.

Conference staff assisted congressional committee staff members working on legislation to extend the EAJA, which expired on September 30, 1984. The extension legislation was passed by Congress in October 1984, but was then vetoed by the President. The Office of the Chairman will continue to be involved with this issue, however, because the EAJA still applies to cases that were pending on its expiration date, and Congress has begun efforts to pass new extension legislation.

Anglo-American Legal Exchange in England.

THE ENGLISH AND AMERICAN TEAMS AT HIGATE HOUSE, CREATON, NORTHAMPTON. SEATED (LEFT TO RIGHT): SIR HARRY WOOLF, CB; SIR DEREK OULTON, CB; JUDGE HOWARD T. MARKEY; CHIEF JUSTICE WARREN E. BURGER; LORD BRIDGE OF HARWICH; JUSTICE SANDRA DAY O'CONNOR; PROFESSOR H.W.R. WADE, MASTER OF GONVILLE AND CAIUS COLLEGE, CAMBRIDGE; AND MICHAEL LUTTIG, SPECIAL ASSISTANT TO THE CHIEF JUSTICE. STANDING (LEFT TO RIGHT): J. B. BAILEY, ESQ.; G.R.R. HART, ESQ.; ROBERTS OWEN, ESQ.; PROFESSOR DAVID WILLIAMS; SIR RALPH GIBSON; DEAN PAUL R. VERKUIL; SIR GORDON SLYNN, ADVOCATE GENERAL, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES; CHARLES D. ABLARD, ESQ.; JUDGE ANTONIN SCALIA; CHAIRMAN LOREN A. SMITH; AND J. M. SULLIVAN, ESQ., Q. C.



THE AMERICAN TEAM AT THE COUNCIL ON TRIBUNALS. LEFT TO RIGHT: DEAN PAUL R. VERKUIL, JUDGE ANTONIN SCALIA, JUSTICE SANDRA DAY O'CONNOR, CHIEF JUSTICE WARREN E. BURGER, CHAIRMAN OF THE COUNCIL LORD GIBSON-WATT, M. C., JUDGE HOWARD T. MARKEY, CHARLES D. ABLARD, ESQ., CHAIRMAN LOREN A. SMITH, AND ROBERTS OWEN, ESQ.

INTERNATIONAL INTERCHANGE

The highlight of the year's international activities was the participation of Chairman Smith in the Anglo-American Legal Exchange. The Exchange features on-site examinations and review by both British and American jurists and distinguished members of the bar. This year's Exchange began with a visit to England by an eight-member delegation, headed by Chief Justice Warren E. Burger, in July. In addition to Chairman Smith, delegation members included Supreme Court Justice Sandra Day O'Connor, Chief Judge Howard T. Markey of the United States Court of Appeals for the Federal Circuit, Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia Circuit, Tulane University Law School Dean Paul R. Verkuil, Washington, D.C. practitioner and ABA Administrative Law Section Chairman Charles D. Ablard, and Roberts Owen, also in private practice in Washington, D.C. The American group spent two weeks in England, holding discussions with officials and practitioners involved in administrative law, and viewing several administrative proceedings.

Those who had hosted the American delegation in England visited the Washington, D.C., area for two weeks in September, viewing proceedings at the Social Security Administration, Federal Communications Commission, and other agencies, and holding discussions with individuals and groups knowledgeable in various aspects of administrative law in this country. The delegation from the United Kingdom was headed by Lord Bridge of Harwich. Its members included Sir Derek Oulton CB, Permanent Secretary to the Lord Chancellor's Department; Professor David Williams, President of Wolfson College, Cambridge; J. B. Bailey, Esq., Deputy Solicitor of the Treasury; Sir Harry Woolf and Sir Ralph Gibson, both justices in the British equivalent to the federal courts of appeals; and J. M. Sullivan, Esquire, Q.C., and G. R. R. Hart, Esq., both in private practice.

Other visitors to the Administrative Conference during the year included Dr. John Griffiths, Director of Research of the Australian Administrative Review Council; Mr. Tamio Okamitsu, Litigation Bureau, Japanese Ministry of Justice; and Professor Lawrence Baxter of the University of Natal School of Law in the Republic of South Africa.

Anglo-American Legal Exchange convenes at ACUS.

LORD BRIDGE OF HARWICH
CHAIRMAN LOREN A. SMITH

CLOCKWISE FROM LOWER LEFT: CHIEF IMMIGRATION JUDGE WILLIAM R. ROBIE; CHIEF ALJS MELVIN WELLES (NLRB), NAHUM LITT (LABOR), CURTIS WAGNER (FERC), AND TOM CAPSHAW (SSA OFFICE OF HEARINGS AND APPEALS); CHARLES W. NIHAN, DEPUTY DIRECTOR OF THE FEDERAL JUDICIAL CENTER; CHAIRMAN SMITH; AND MEMBERS OF THE ENGLISH TEAM: PROFESSOR DAVID WILLIAMS, SIR RALPH GIBSON, G. R. R. HART, ESQ., LORD BRIDGE OF HARWICH, SIR HARRY WOOLF, AND SIR DEREK OULTON, CB.

Anglo-American Legal Exchange discussion of ALJs.

◀ LORD BRIDGE OF HARWICH

U.S. ADMINISTRATIVE LAW JUDGES
MELVIN WELLES
NAHUM LITT
CURTIS WAGNER ▶

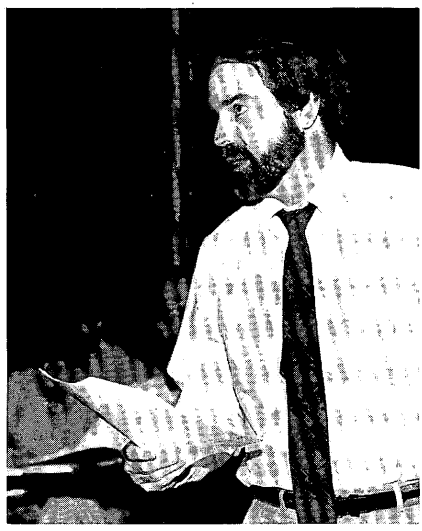
◀ G. R. R. HART, ESQ.

J. B. BAILEY, ESQ. ▶

◀ SIR HARRY WOOLF
SIR DEREK OULTON, CB

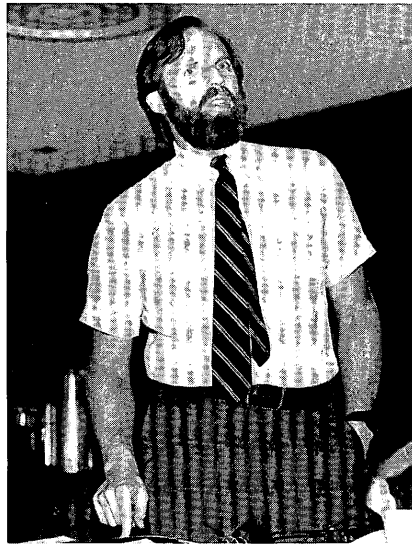
J. M. SULLIVAN, ESQ., Q.C. ▶

Members at the Twenty-eighth Plenary Session.

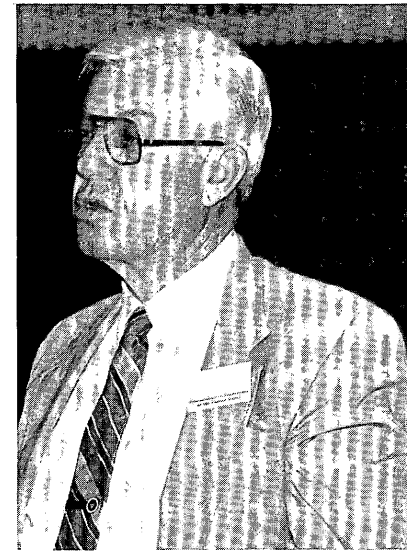


◀ WILLIAM A. BUTLER

JOSEPH A. MORRIS ▶



◀ ALAN B. MORRISON



JAMES S. MUNN ▶

RESEARCH ACTIVITIES

Research Planning

In accordance with the Assembly's 1980 *Resolution on Research Planning*, Research Director Jeffrey S. Lubbers prepared a research plan for 1984. The plan updated the roster of pending projects and the list of potential research topics. The lengthy list of proposed projects, containing suggestions from inside and outside the Conference, was sent to 75 administrative law professors across the country who had been recommended by Conference members or who had been successful consultants in prior years. The response to this solicitation was gratifyingly large and will provide a strong foundation for future research planning.

Research Projects Commissioned in 1984

Eight new projects were begun in 1984. Detailed project descriptions may be found in the "Committees" chapter and under the heading "Unassigned Research Projects" in this chapter.

Consultant	Project
RONALD A. CASS	*Governmental torts*
COLIN S. DIVER	*Joint federal/state regulation*
GEORGE R. JOHNSON, JR.	*Split agency enforcement*
THOMAS D. MORGAN	*Regulatory budget*
HENRY H. PERRITT, JR.	*Regulatory negotiation*
RICHARD J. PIERCE, JR.	*Preemption*
MALCOLM C. RICH	*ALJ unified state corps*
SCOTT C. WHITNEY	*Permit procedures at EPA*

Consultants at the Twenty-eighth Plenary Session.

GREGORY L. OGDEN

TERESA M. SCHWARTZ

JACK M. KRESS

FREDERICK R. ANDERSON, JR.

Active Research Projects (December 31, 1984)

Project*	Committee**	Consultant
ALJ performance evaluation	ADJ	VICTOR G. ROSENBLUM
ALJ unified state corps	ADJ	MALCOLM C. RICH
Alternative dispute resolution	ADM	PHILIP J. HARTER
British Council of Tribunals	—	JOHN H. REESE
Cost/benefit analysis preclusion	—	ALFRED S. NEELY IV
Debt Collection Act of 1982	ADM	LUIZE E. ZUBROW
Declaratory orders	—	BURNELE V. POWELL
Environmental citizen suits	GP	BARRY B. BOYER
Governmental torts	ADM	RONALD A. CASS
Hearing officers, non-ALJs	—	LARRY A. BAKKEN
Joint federal/state regulation	REG	COLIN S. DIVER
Permit procedures at EPA	GP	SCOTT C. WHITNEY
Regulatory analysis	RM	THOMAS O. MCGARITY
Regulatory budget	REG	THOMAS D. MORGAN
Regulatory negotiation review	—	HENRY H. PERRITT, JR.
Representation by non-lawyers	REG	—
Split agency enforcement	ADJ	GEORGE R. JOHNSON, JR.
State administrative law	—	L. HAROLD LEVINSON

*Project descriptions appear in the "Committees" chapter and under the heading "Unassigned Research Projects" in this chapter.

**Committees:

ADJ Adjudication
ADM Administration
GP Governmental Processes
JR Judicial Review
REG Regulation
RM Rulemaking
— Unassigned

Unassigned Research Projects

The following research projects are proceeding under the guidance of the Office of the Chairman, and have not been assigned to any committee of the Conference.

Agency Use of Non-ALJ Hearing Officers

The Conference has done much research on formal agency adjudication, i.e., adjudication involving the use of specially hired and independent administrative law judges. However, many programs that require hearings are not required to utilize ALJs. This project, aided by a questionnaire sent to all adjudicating agencies, will catalog and study these programs. Professor Larry A. Bakken is conducting this study.

Statutory Preclusion of the Application of Cost/Benefit Analysis

The recent movement toward use of cost/benefit analysis in regulation has bumped up against various statutory provisions forbidding or limiting cost considerations in regulation. Professor Alfred S. Neely IV has undertaken a comprehensive statutory search to identify such provisions, and has selected several provisions for analysis. Professor Neely submitted a draft report during 1984. A final report is expected early in 1985.

Use of Declaratory Orders Under the Administrative Procedure Act

Although 5 U.S. Code 554(e) provides for agency use of declaratory orders to terminate controversies, this provision is rarely used. Professor Burnele V. Powell submitted a draft report encouraging greater use of declaratory orders. A final report is expected early in 1985.

Operations of the British Council on Tribunals

The activities of the British Council on Tribunals may provide lessons for ACUS on increasing the Conference's role in procedural reform and improving implementation of Conference recommendations. Professor John H. Reese undertook this study during a teaching sabbatical as visiting professor at the University of Edinburgh in 1983–84.

Survey of State Administrative Procedures

The Office of the Chairman has continued its study of state administrative law, directed by Professor L. Harold Levinson. Professor Levinson surveyed the universe of state procedural innovations which may be appropriate for adoption and use in the reform of federal administrative law. He submitted monographs on the subjects of state hearing officers and legislative review of agency rulemaking. The latter formed the basis for the Conference's discussion at the Twenty-seventh Plenary Session in December 1983 and was published by the Conference in 1984 as a portion of the Conference debate on legislative vetos.

Agency Experience Using Regulatory Negotiation

To follow up on Recommendation 82-4, which urged agency experimentation with regulatory negotiation in rulemaking, the Conference has asked Professor Henry H. Perritt, Jr., to evaluate actual agency experience. To date three agencies (FAA, EPA, and OSHA) have used this procedure. Professor Perritt will be interviewing participants and assessing the value of the procedure, and generally providing the Conference with the information necessary to enable it to continue to act as a leader in this area. His report will be submitted in 1985.

PUBLICATIONS OF THE ADMINISTRATIVE CONFERENCE

The Administrative Conference Act provides for publication by the Conference of reports directed toward evaluating and improving administrative procedure. The Office of the Chairman publishes the officially adopted recommendations and statements of the Assembly, along with any accompanying research reports, as well as other reports and documents that the Chairman believes will further the purposes of the Act.

Continuing Publications

Recommendations and Reports

The four volume series entitled *Recommendations and Reports of the Administrative Conference of the United States* contains texts of the recommendations and statements adopted by the Assembly between January 8, 1968, and December 31, 1977. These volumes also contain related research reports. Since 1978 these materials have been published in annual volumes under the title *Administrative Conference of the United States: Recommendations and Reports*. These publications are distributed by the Office of the Chairman.

1984 Publications

Legislative Veto of Agency Rules after INS v. Chadha.

In 1983 the United States Supreme Court held unconstitutional, in *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, a section of the Immigration and Nationality Act authorizing either house of Congress, by resolution, to invalidate a decision of the Attorney General to suspend the deportation of an alien. The Court held that such action by one house of Congress was essentially legislative and, thus, subject to the constitutional requirements of passage by a majority of both houses of Congress and presentation to the President. The Court's memorandum decisions two weeks later in *Process Gas Consumers Group v. Consumers Energy Council of America* and *United States Senate v. Federal Trade Commission*, 103 S. Ct. 3556, confirmed that virtually all existing legislative veto provisions are invalid.

The Supreme Court's legislative veto decisions stimulated a general debate on the function that had been fulfilled by the legislative veto

Members and guests at the Reception for the Twenty-ninth Plenary Session.

◀ RICHARD J. LEIGHTON
ROBERT E. FREER, JR.
EDWIN MEESE III

LOREN A. SMITH
CHIEF JUSTICE WARREN E. BURGER ▶
EDWIN MEESE III

FREDERIC L. CONWAY
◀ MRS. WARREN E. BURGER
CHIEF JUSTICE WARREN E. BURGER

SOLICITOR GENERAL REX E. LEE
T. TIMOTHY RYAN, JR. ▶

STEPEHN BREYER
◀ A. LEO LEVIN, DIRECTOR,
FEDERAL JUDICIAL CENTER

MARSHALL J. BREGER, PRESIDENTIAL ASSISTANT
ELLIOT ABRAMS, ASSISTANT SECRETARY OF STATE
CRAIG BAAB, AMERICAN BAR ASSOCIATION

CHARLES W. NIHAN
JOSEPH F. SPANIOL, JR.
MRS. WARREN E. BURGER
CHIEF JUSTICE WARREN E. BURGER

CHARLES C. THARP
ROBERT J. D'AGOSTINO

EDWARD D. RE
PAUL D. KAMENAR
LOREN A. SMITH

JOHN R. BLOCK, SECRETARY OF AGRICULTURE
CHIEF JUSTICE WARREN E. BURGER
MRS. BURGER

and the need for finding constitutional substitutes for the veto. At its 27th Plenary Session in December 1983, the Assembly took up this issue. This volume includes the transcript of the Conference's debate, as well as a report prepared by Conference consultant L. Harold Levinson.

Copies may be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20401 (Stock No. 052-003-00947-1), or requested from the Office of the Chairman.

Colloquium on Regulatory Design in Theory and Practice

The first two volumes of colloquia summaries were published in 1984. Volume I covers the meetings held in the 1982-1983 series and Volume II covers the 1983-1984 series. These summaries of presentations given at the colloquia are intended to be used as a reference by those people who attended the meetings on theoretical and practical issues related to regulation. They are also valuable for those who were unable to attend the sessions but want to obtain a sense of what the meetings were about. Copies are available from the Office of the Chairman.

Directory of Administrative Hearing Facilities

The 1984 edition of the *Directory of Administrative Hearing Facilities* is a working example of continuing cooperative efforts among agencies. It updates the original *Directory* which was published in February 1981, listing and describing courtrooms, conference and hearing rooms, and other locations across the country, excluding the District of Columbia, in which agency proceedings may be held.

Conference staff, coordinated by staff attorney Charles Pou, Jr., sent questionnaires regarding administrative hearing facilities to approximately 50 federal agencies. The new *Directory* presents current information on listings submitted in response to the questionnaires by agencies that use administrative law judges or have boards of contract appeals or grant appeals boards. It also contains information supplied by the American Bar Association Conference of Administrative Law Judges. The *Directory* is organized by city within each state, and includes maps showing, for each state, all cities that have facilities, as well as some scheduling tips to aid in locating appropriate space.

The *Directory* is a response to continuing complaints from agency personnel and members of the bar about scheduling difficulties and shortages of adequate facilities. Distribution of the *Directory* has partially implemented *Recommendation 68-1: Adequate Hearing Facilities*, which called on the General Services Administration to prepare and keep current an inventory of available federal and non-federal sites.

If agency response to the 1984 edition is as enthusiastic as it was to the 1981 edition, the Office of the Chairman plans to prepare future editions that will include listings for additional facilities and provide fuller descriptions for many sites already mentioned. Copies of the *Directory* are available from the Office of the Chairman.

Administrative Conference of the United States: A Bibliography 1968–1983

The purposes of this indexed bibliography are to acquaint the researcher with the work of the Administrative Conference and to assist in locating reports by supplying the appropriate bibliographic information. The *Bibliography* covers the major work of the Conference from its First Plenary Session in May 1968, through the Twenty-seventh Plenary Session in December 1983. During this period 97 recommendations were adopted along with 10 formal statements, all of which were based on reports prepared by consultants, committees, or staff members. Included are 162 reports of consultants and staff members with each entry including the author, title, and citations to all publications of that entry. Entries resulting in Conference recommendations also provide the recommendation number, title, and a citation to the *Code of Federal Regulations* or the *Federal Register*. An index is included to assist in finding reports on topics of special interest.

The bibliography may be requested from the Office of the Chairman. It is also published in *Administrative Conference of the United States: Recommendations and Reports 1983* and Mezines, Stein, Gruff, *Administrative Law*, New York, Matthew Bender, 1983.

Pending Publications

Federal Administrative Procedure Sourcebook

In 1984, the Office of the Chairman began drafting its *Federal Administrative Procedure Sourcebook: Statutes and Related Materials*. This volume is intended to serve as a basic introduction and reference book on the 15 major procedural laws affecting the operation of federal agencies. These statutes are:

Administrative Procedure Act
Agency Practice Act
Claims Collection Act
Contract Disputes Act
Debt Collection Act
Equal Access to Justice Act
Ethics in Government Act
Federal Advisory Committee Act
Federal Tort Claims Act
Freedom of Information Act
Government in the Sunshine Act
National Environmental Policy Act
Paperwork Reduction Act
Privacy Act
Regulatory Flexibility Act

The *Sourcebook*, directed to agency personnel (both lawyers and nonlawyers), researchers, and practicing attorneys, will explain the operation of these statutes. The book will discuss briefly each statute's purpose, operation, legislative history, relevant case law, implementing regulations, and bibliographic resources. For each law, the *Sourcebook* will also include citations, the text, and interpretive materials from the Department of Justice, OMB, the Conference, and other lead agencies. The *Sourcebook*, which is being prepared under the supervision of staff attorney Charesl Pou, Jr., is expected to be published in mid-1985.

BIOGRAPHICAL INFORMATION

Members, Liaison Representatives, Senior Fellows, Special Counsels, Consultants (January 1, 1984—December 31, 1984)

Arvil V. Adams, consultant—Director, Public Policy Program, George Washington University, Washington, D.C. *ACUS*: Consultant on MSPB Alternative Dispute Resolution System, since 1983.

William H. Allen, senior fellow—Member of the law firm of Covington & Burling, Washington, D.C. *ACUS*: Public Member 1972-1982; Senior Fellow since 1982; Committee on Judicial Review.

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Robert A. Anthony, senior fellow, consultant—Professor of Law, George Mason University School of Law, Arlington, Virginia. *ACUS*: Chairman 1974-1979; Consultant on Comparative Proceedings for Broadcast Licensing 1970-1971, Confidential Information in ITC Cases (Recommendation 84-6) 1982-1984; Senior Fellow since 1982; Committee on Regulation.

Cornwell G. Appleby, public member—Associate General Counsel, Booz, Allen & Hamilton, Inc., Bethesda, Maryland. *ACUS*: Public Member 1982-1984; Committee on Administration.

J. C. Argetsinger, liaison representative-ACTION—General Counsel, ACTION, Washington, D.C. *ACUS*: Liaison Representative since 1982; Committee on Rulemaking.

Saundra Brown Armstrong, government member-CPSC—Commissioner, Consumer Product Safety Commission, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Governmental Processes.

James K. Asselstine, government member-NRC—Commissioner, Nuclear Regulatory Commission, Washington, D.C. *ACUS*: Government Member since 1982; Committee on Rulemaking.

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Michael Bradfield, government member-Federal Reserve—General Counsel, Board of Governors of the Federal Reserve System, Washington, D.C. *ACUS*: Government Member since 1981; Committee on Regulation.

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Alex Kozinski, liaison representative-U.S. Claims Court—Chief Judge, U.S. Claims Court, Washington, D.C. *ACUS*: Liaison Representative (MSPB) 1982, U.S. Claims Court since 1982; Committee on Judicial Review.

Jack M. Kress, consultant—Visiting Scholar, Administrative Conference of the U.S., Washington, D.C. *ACUS*: Consultant on Inspections for Regulatory Violations 1982-1984.

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Jacqueline C. Leifer, consultant—Member of the law firm of Boasberg, Klores, Feldesman & Tucker, Washington, D.C. *ACUS*: Consultant on Grants Dispute Resolution (Recommendation 82-2) 1981-1982; Debt Collection Act, since 1984.

Richard J. Leighton, public member—Attorney with Buchanan Ingersoll, P.C., Washington, D.C. *ACUS*: Public Member since 1983; Committee on Adjudication (Chairman).

Michel Levant, government member-FERC—Judge, Office of Administration Law Judges, Federal Energy Regulatory Commission, Washington, D.C. *ACUS*: Government Member since 1982; Committee on Adjudication.

Daniel R. Levinson, government member-OPM—Deputy General Counsel, Office of Personnel Management, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Administration.

L. Harold Levinson, consultant—Professor of Law, Vanderbilt University School of Law, Nashville, Tennessee. *ACUS*: Consultant on Legislative Veto 1983; State Administrative Law, since 1976.

Nahum Litt, liaison representative-American Bar Association, National Conference of Administrative Law Judges—Chief Administrative Law Judge, Department of Labor, Washington, D.C. *ACUS*: Government Member (Labor) 1979-1980; Liaison Representative since 1984; Committee on Rulemaking.

Bevis Longstreth, government member-SEC—Commissioner, Securities and Exchange Commission, Washington, D.C. *ACUS*: Government Member 1982-1984; Committee on Rulemaking (Vice Chairman through June 1984).

Philip A. Loomis, Jr., senior fellow—Attorney-at-Law, Chevy Chase, Maryland. *ACUS*: Government Member (SEC) 1968-1982; Senior Fellow 1982-1984; Committee on Rulemaking.

K. E. Malmborg, government member-State—Assistant Legal Advisor, Department of State, Washington, D.C. *ACUS*: Government Member since 1974; Committee on Adjudication.

Henry G. Manne, public member—Director, Law and Economics Center, Emory University, Atlanta, Georgia. *ACUS*: Public Member 1982-1984; Committee on Regulation.

Irving P. Margulies, government member-Commerce—Acting General Counsel, Department of Commerce, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Rulemaking.

Howard T. Markey, liaison representative-U.S. Court of Appeals, Federal Circuit—Chief Judge, U.S. Court of Appeals for the Federal Circuit, Washington, D.C. *ACUS*: Liaison Representative since 1982; Committee on Judicial Review.

Malcolm S. Mason, senior fellow—Attorney-at-Law, Washington, D.C. *ACUS*: Government Member (OEO) 1968-1973 (HEW) 1973-1979; Senior Fellow since 1984; Committee on Administration.

Jane A. Matheson, public member, special counsel—Deputy Assistant Secretary, Occupational Safety and Health Administration, Department of Labor, Washington, D.C. *ACUS*: Government Member (OSHRC) 1982-1983; Public Member 1983-1984; Special Counsel since 1984; Committee on Adjudication (Chairman through June 1984).

James McClellan, public member—Director, Center for Judicial Studies, Washington, D.C. *ACUS*: Public Member since 1984; Committee on Judicial Review.

Barbara E. McConnell, government member-CAB—Vice Chairman, Civil Aeronautics Board, Washington, D.C. *ACUS*: Government Member since 1983; Committee on Rulemaking.

Thomas O. McGarity, consultant—Professor of Law, University of Texas School of Law, Austin, Texas. *ACUS*: Consultant on Race to the Courthouse (Recommendation 80-5) 1979-1980; Regulatory Analysis, since 1982.

Carl McGowan, liaison representative-Judicial Conference of the U.S.—Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C. *ACUS*: Liaison Representative since 1979; Committee on Judicial Review.

Clarence V. McKee, public member—Member of the law firm of Pepper & Corazzini, Washington, D.C. *ACUS*: Public Member since 1982; Committee on Regulation.

James C. Miller III, council member—Chairman, Federal Trade Commission, Washington, D.C. *ACUS*: Council Member since 1981; Committee on Regulation.

Anthony L. Mondello, senior fellow—General Counsel, AMTRAK, Washington, D.C. *ACUS*: Government Member (Civil Service Commission) 1971–1975; Public Member 1975–1982; Senior Fellow since 1982; Committee on Governmental Processes.

Thomas D. Morgan, consultant—Dean, Emory University School of Law, Atlanta, Georgia. *ACUS*: Consultant on Ratemaking Delay (Recommendation 78-1) 1976–1978; Conflict of Interest for Government Lawyers (Recommendation 79-7) 1978–1979; Regulatory Budget, since 1984.

Joseph A. Morris, government member-OPM—Acting General Counsel, Office of Personnel Management, Washington, D.C. *ACUS*: Government Member 1981–1984; Committee on Administration (Vice Chairman through September 1984).

Alan B. Morrison, public member—Director, Public Citizen Litigation Group, Washington, D.C. *ACUS*: Public Member since 1980; Committee on Governmental Processes.

Marvin H. Morse, government member-SBA—Chief Administrative Law Judge, Office of Hearings and Appeals, Small Business Administration, Washington, D.C. *ACUS*: Government Member (OPM) 1980–1982, (SBA) 1982–1984; Committee on Administration.

Gerald J. Mossinghoff, liaison representative-PTO—Commissioner, Patent and Trademark Office, Arlington, Virginia. *ACUS*: Liaison Representative since 1984; Committee on Adjudication.

James S. Munn, public member—Of Counsel to Shulkin, Hutton & Bucknell, Inc., P.S., Seattle, Washington. *ACUS*: Public Member since 1982; Committee on Rulemaking.

J. E. Murdock III, government member-Transportation—Chief Counsel, Federal Aviation Administration, Washington, D.C. *ACUS*: Government Member since 1981; Committee on Rulemaking.

Alfred S. Neely IV, consultant—Professor of Law, University of Missouri-Columbia, School of Law, Columbia, Missouri. *ACUS*: Consultant on Statutory Prohibitions on the Use of Cost/Benefit Analysis, since 1981.

David E. Nething, liaison representative-Advisory Commission on Intergovernmental Relations—Senate Majority Leader, North Dakota State Senate, Jamestown, North Dakota. *ACUS*: Liaison Representative since 1983; Committee on Regulation.

Charles W. Nihan, liaison representative-Federal Judicial Center—Deputy Director, Federal Judicial Center, Washington, D.C. *ACUS*: Liaison Representative since 1984; Committee on Judicial Review.

Alice L. O'Donnell, liaison representative-Federal Judicial Center, special counsel—Director of Inter-Judicial Affairs, Federal Judicial Center, Washington, D.C. *ACUS*: Liaison Representative 1976–1984; Special Counsel since 1984; Committee on Judicial Review.

Gregory L. Ogden, consultant—Professor of Law, Pepperdine University School of Law, Malibu, California. *ACUS*: Consultant on Siting of Industrial Facilities (Recommendation 84-1) 1982-1984.

Daniel Oliver, council member—General Counsel, Department of Agriculture, Washington, D.C. *ACUS*: Government Member (Education) 1981-1983; Council Member since 1983; Committee on Judicial Review.

Owen Olpin, senior fellow—Member of the law firm of O'Melveny & Myers, Los Angeles, California. *ACUS*: Public Member 1972-1982; Senior Fellow since 1982; Committee on Regulation.

James J. O'Meara, Jr., liaison representative-Federal Administrative Law Judges Conference—Administrative Law Judge, National Labor Relations Board, Washington, D.C. *ACUS*: Liaison Representative since 1984; Committee on Governmental Processes.

Christopher Osakwe, consultant—Professor of Law, Tulane University School of Law, New Orleans, Louisiana. *ACUS*: Consultant on Reexamination of Standards of Judicial Review 1983-1984.

Max D. Paglin, senior fellow—Member of the law firm of Weil, Gotshal & Manges, Washington, D.C. *ACUS*: Government Member (FCC) 1968-1972, (Atomic Energy Commission) 1972-1974, (NRC) 1974-1975; Consultant on Implementation of ACUS Recommendations 1975-1976, Natural Gas Shortages (Statement No. 5) 1976, Management Seminars for Agency Officials 1976, Agency Procedural Review 1977; Public Member 1978-1982; Senior Fellow since 1982; Committee on Judicial Review.

Sallyanne Payton, public member—Associate Professor, University of Michigan School of Law, Ann Arbor, Michigan. *ACUS*: Consultant on Administration of Grant Programs 1980-1983; Public Member since 1980; Committee on Administration.

Aulana Peters, government member-SEC—Commissioner, Securities & Exchange Commission, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Adjudication.

Richard J. Pierce, Jr., consultant—Dean, University of Pittsburgh School of Law, Pittsburgh, Pennsylvania. *ACUS*: Consultant on Preemption of State Regulation (Recommendation 84-5) 1984.

Burnele V. Powell, consultant—Professor of Law, University of North Carolina School of Law, Chapel Hill, North Carolina. *ACUS*: Consultant on Declaratory Orders, since 1982.

William T. Quillen, public member—Member of the law firm of Potter, Anderson & Corroon, Wilmington, Delaware. *ACUS*: Public Member since 1982; Committee on Judicial Review.

Bruce Rabb, public member—Member of the law firm of Stroock & Stroock & Lavan, New York, New York. *ACUS*: Public Member since 1982; Committee on Adjudication.

Kenneth M. Raisler, government member-CFTC—General Counsel, Commodity Futures Trading Commission, Washington, D.C. *ACUS*: Government Member since 1983; Committee on Judicial Review.

Edward D. Re, liaison representative-U.S. Court of International Trade—Chief Judge, U.S. Court of International Trade. *ACUS*: Liaison Representative since 1984; Committee on Rulemaking.

John H. Reese, consultant—Professor of Law, University of Denver College of Law, Denver, Colorado. *ACUS*: Consultant on British Council on Tribunals, since 1982.

Frank P. Reiche, government member-FEC—Commissioner, Federal Election Commission, Washington, D.C. *ACUS*: Government Member since 1982; Committee on Adjudication.

William Bradford Reynolds, government member-Justice—Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Governmental Processes.

Malcolm C. Rich, consultant—Foundation for Educational Research, Inc., Skokie, Illinois. *ACUS*: Consultant on State Unified Corps of ALJs, since 1984.

James R. Richards, government member-Energy—Inspector General, Department of Energy, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Rulemaking.

Ronald E. Robertson, public member—Reagan-Bush '84, Washington, D.C. *ACUS*: Public Member since 1982; Committee on Administration, Special Committee on Uniform Rules.

Reuben B. Robertson III, senior fellow—Member of the law firm of Hydeman, Mason, Burzio & Lloyd, Washington, D.C. *ACUS*: Chairman 1980-1981; Senior Fellow since 1982; Committee on Adjudication.

William R. Robie, liaison representative-Board of Immigration Appeals—Chief Judge, Board of Immigration Appeals, Department of Justice, Falls Church, Virginia. *ACUS*: Liaison Representative since 1984; Committee on Rulemaking.

Joseph H. Rodriguez, public member—Public Advocate, Trenton, New Jersey. *ACUS*: Public Member 1982-1984; Committee on Adjudication.

Henry Rose, liaison representative-PBGC—General Counsel, Pension Benefit Guaranty Corporation, Washington, D.C. *ACUS*: Liaison Representative 1982-1984; Committee on Administration.

Jonathan Rose, consultant—Professor of Law, Arizona State University College of Law, Tempe, Arizona. *ACUS*: Consultant on Representation by Non-Lawyers 1982-1984.

Jonathan C. Rose, government member-Justice—Assistant Attorney General, Office of Legal Policy, Department of Justice, Washington, D.C. *ACUS*: Government Member 1981-1984; Committee on Governmental Processes.

Victor G. Rosenblum, public member, consultant—Professor of Law, Northwestern University School of Law, Chicago, Illinois. *ACUS*: Public Member since 1982; Consultant on Citizen Complaints 1971, ALJ Study 1974-1976, Evaluation of ALJ Performance, since 1979; Committee on Administration.

Jane R. Roth, public member—Member of the law firm of Richards, Layton & Finger, Wilmington, Delaware. *ACUS*: Public Member 1982-1984; Committee on Adjudication.

Harold L. Russell, senior fellow—Member of the law firm of Gambrell & Russell, Atlanta, Georgia. *ACUS*: Council Member 1968-1977; Senior Fellow since 1983; Committee on Judicial Review.

T. Timothy Ryan, Jr., public member—Member of the law firm of Pierson, Ball & Dowd, Washington, D.C. *ACUS*: Government Member (Labor) 1981; Council Member 1981-1983; Public Member since 1983; Committee on Judicial Review, Special Committee on Uniform Rules.

William H. Satterfield, government member-FERC—General Counsel, Federal Energy Regulatory Commission, Washington, D.C. *ACUS*: Government Member (Interior) 1983-1984, FERC since 1984; Committee on Regulation since October 1984, previously Committee on Governmental Processes.

Philip D. Saxon, public member—Member of the law firm of Obermayer, Rebmann, Maxwell & Pippel, Wilmington, Delaware. *ACUS*: Public Member since 1984; Committee on Governmental Processes.

Antonin Scalia, senior fellow—Judge, U.S. Court of Appeals for the District of Columbia Circuit, Washington, D.C. *ACUS*: Chairman 1972-1974; Public Member 1978-1982; Senior Fellow since 1982; Committee on Governmental Processes.

Terrence M. Scanlon, government member-CPSC—Vice Chairman, Consumer Product Safety Commission, Washington, D.C. *ACUS*: Government Member 1983-1984; Committee on Governmental Processes.

Phyllis Schlafly, public member—Attorney-at-law, Alton, Illinois. *ACUS*: Public Member since 1982; Committee on Regulation.

Edward C. Schmults, council member—Deputy Attorney General, Department of Justice, Washington, D.C. *ACUS*: Council Member 1977-1981, 1981-1984; Committee on Rulemaking.

Teresa M. Schwartz, consultant—Professor of Law, George Washington University National Law Center, Washington, D.C. *ACUS*: Consultant on CPSC Study 1981-1982, Product Recalls (Recommendation 84-2) 1983-1984.

Jerome D. Sebastian, government member-Treasury—Assistant Chief Counsel, Internal Revenue Service, Washington, D.C. *ACUS*: Government Member since 1982; Committee on Regulation.

Harold I. Sharlin, consultant—H.I.S. Associates, Washington, D.C. *ACUS*: Consultant on ACUS Regulatory Colloquium, since 1982.

Jack D. Smith, government member-FCC—General Counsel, Federal Communications Commission, Washington, D.C. *ACUS*: Government Member since 1984; Committee on Rulemaking.

Loren A. Smith, chairman—Chairman of the Administrative Conference of the United States since 1981.

Otis M. Smith, council member—Member of the law firm of Lewis, White & Clay, Detroit, Michigan. *ACUS*: Public Member 1972-1978; Council Member since 1978; Committee on Judicial Review.

Richard B. Smith, liaison representative-American Bar Association Coordinating Group on Regulatory Reform—Member of the law firm of Davis, Polk & Wardwell, New York, New York. *ACUS*: Council Member 1971-1974; Liaison Representative since 1981; Committee on Regulation.

Willis B. Snell, liaison representative-American Bar Association Section of Administrative Law—Member of the law firm of Sutherland, Asbill & Brennan, Washington, D.C. *ACUS*: Liaison Representative since 1984; Committee on Regulation.

Milton J. Socolar, liaison representative-GAO—General Counsel, General Accounting Office, Washington, D.C. *ACUS*: Liaison Representative 1978-1984; Committee on Administration.

Joseph F. Spaniol, Jr., liaison representative-Administrative Office of the U.S. Courts—Deputy Director, Administrative Office of the U.S. Courts; Liaison Representative since 1977; Committee on Governmental Processes.

Stanley Sporkin, liaison representative-CIA—General Counsel, Central Intelligence Agency, Washington, D.C. *ACUS*: Liaison Representative since 1982; Committee on Governmental Processes.

Janet D. Steiger, liaison representative-PRC—Chairman, Postal Rate Commission, Washington, D.C. *ACUS*: Liaison Representative since 1981; Committee on Rulemaking.

Michael H. Stein, liaison representative-USITC—General Counsel, U.S. International Trade Commission, Washington, D.C. *ACUS*: Liaison Representative 1982-1984; Committee on Regulation.

Robert E. Stein, consultant—Attorney-at-law, Washington, D.C. *ACUS*: Consultant on Burden of Proof in Permitting Processes 1983-1984.

Peter L. Strauss, public member—Professor of Law, Columbia University Law School, New York, New York. *ACUS*: Consultant on Mining Claims on Public Lands 1974, Impact of Judicial Review on Rulemaking 1977-1978, Disqualification of Decisional Officials (Recommendation 80-4) 1979-1980; Government Member (NRC) 1976-1977; Public Member since 1982; Committee on Judicial Review.

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Frank S. Swain, government member-SBA—Chief Counsel for Advocacy, Small Business Administration, Washington, D.C. *ACUS*: Government Member since 1982; Committee on Regulation.

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Edgar H. Twine, public member—Associate General Counsel, Atlantic Richfield Company, Los Angeles, California. *ACUS*: Public Member 1980-1984; Committee on Rulemaking.

Michael Uhlmann, liaison representative-Executive Office of the President—Special Assistant to the President and Assistant Director for Legal Policy, Washington, D.C. *ACUS*: Liaison Representative 1982-1984; Committee on Governmental Processes.

Paul R. Verkuil, public member—Dean, Tulane University School of Law, New Orleans, Louisiana. *ACUS*: Consultant on Preenforcement Judicial Review of Rules (Recommendation 74-4) 1974, Informal Adjudication 1975-1976, Intergovernmental Communications in Informal Rulemaking (Recommendation 80-6) 1979-1980, Judicial Review of Rules in Enforcement Proceedings (Recommendation 82-7) 1981-1982, Regulatory Flexibility Act 1981, Immigration Adjudications, since 1983; Public Member 1982-1984; Committee on Governmental Processes.

Michael B. Wallace, public member—Member of the law firm of Jones, Mockbee & Bass, Jackson, Mississippi. *ACUS*: Public Member since 1984; Committee on Regulation.

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David M. Welborn, consultant—Professor of Political Science, University of Tennessee, Knoxville, Tennessee. *ACUS*: Consultant on Management of Regulatory Agencies (Statement No. 4) 1972-1975; Government in the Sunshine Act (Recommendation 84-3) 1981-1984.

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Jerre S. Williams, senior fellow—Judge, United States Court of Appeals for the Fifth Circuit, Austin, Texas. *ACUS*: Chairman 1968–1970; Public Member 1972–1978; Senior Fellow since 1982; Committee on Judicial Review.

Lance H. Wilson, public member—President, Housing Development Corporation, New York, New York. *ACUS*: Public Member since 1984; Committee on Administration.

Frank M. Wozencraft, senior fellow—Member of the law firm of Baker & Botts, Houston, Texas. *ACUS*: Council Member (Vice Chairman) 1968–1971; Public Member 1975–1980; Senior Fellow since 1982; Committee on Regulation.

Seth D. Zinman, government member-Labor—Associate Solicitor, Division of Legislation and Legal Counsel, U.S. Department of Labor, Washington, D.C. *ACUS*: Government Member since 1981; Committee on Judicial Review.

Luize E. Zubrow, consultant—Professor of Law, George Washington University National Law Center, Washington, D.C. *ACUS*: Consultant on Debt Collection Act, since 1984.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE*

SECTION 1: ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, 5 U.S.C. § 571 et seq. (1976), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

SECTION 2: MEMBERSHIP

(a) General

(1) Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (a) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention; or (b) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose

*As revised December 18, 1982. The bylaws are codified in the Code of Federal Regulations, Title I, Part 302 (e.g., Section 1 of the bylaws appears at 1 C.F.R. § 302.1).

action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No non-Government members, other than senior fellows, shall at any time be in continuous service beyond four full terms.

(c) Eligibility and Replacements

(1) A member designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (2) of subsection (a).

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of the Conference for eight or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals from June 30, 1970. Senior fellows shall have all the privileges of members, but may not vote.

SECTION 3: COMMITTEES

The Conference shall have the following standing committees:

1. Committee on Adjudication;
2. Committee on Administration;
3. Committee on Governmental Processes;
4. Committee on Judicial Review;
5. Committee on Regulation; and
6. Committee on Rulemaking.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

SECTION 4: LIAISON ARRANGEMENTS

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, Federal agencies which are not represented on the Conference, and professional associations. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

SECTION 5: AVOIDANCE OF CONFLICTS OF INTEREST

(a) Disclosure of Interests

(1) Non-Government members may be deemed to be special Government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201–224 of title 18 U.S.C., in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with part III of Executive Order 11222, as amended, or any successor Presidential or statutory requirement. Without conceding the correctness of the view that non-Government members are special Government employees, the Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or executive order, each member, public or governmental, shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general

statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The Chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in subsection (b), members may vote or participate in matters before the Conference without additional disclosure of interest.

(b) Disqualifications

(1) In accordance with 18 U.S.C. § 208 a member shall not, except as provided in paragraphs (2) or (3) of this subsection, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this subsection (b) a member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (1), a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference statement or action relating to the procedure of any Federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. § 208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification, including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. § 208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such deter-

mination, vote and otherwise participate in the disposition of the matter.

SECTION 6: GENERAL

(a) Meetings

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) Members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under consideration, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(c) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the General Counsel not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(d) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(e) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

THE ADMINISTRATIVE CONFERENCE ACT

TITLE 5, UNITED STATES CODE, CHAPTER 5

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES*

§ 571. Purpose

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572. Definitions

For the purpose of this subchapter—

(1) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

*Public Law 88-499, August 30, 1964, 78 Stat. 615; as codified by Public Law 89-554, September 6, 1966, 80 Stat. 388-390; as amended by Public Law 92-526, Section 1, October 21, 1972, 86 Stat. 1048; as amended by Public Law 97-330, October 15, 1982, 96 Stat. 1618.

§ 573. Administrative Conference of the United States

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574. Powers and duties of the Conference

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575. Organization of the Conference

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchaper for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be

used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes, property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the revised Statutes (31 U.S.C. 665(b));

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576. Appropriations

There are authorized to be appropriated to carry out the purposes of this subchapter sums not to exceed $2,300,000 for the fiscal year ending September 30, 1982, and not to exceed $2,300,000 for each fiscal year thereafter up to and including the fiscal year ending September 30, 1986.